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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 551

ALLAN D. EMIL, AS TRUSTEE IN BANKRUPTCY OF JOHN M. RUSSELL, INC., PETITIONER,

vs.

HARRY HANLEY, RECEIVER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1942.

CERTIORARI GRANTED JANUARY 4, 1943.



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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of JOHN M. RUSSELL, INC., Bankrupt

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc., Appellant,

HARRY HANLEY, Receiver, Appellee

STATEMENT UNDER RULE XIII

The proceeding leading to the order under appeal was begun by motion based on a petition of the trustee, verified August 15th, 1941, accompanied by notice of motion dated August 15th, 1941. The object of the motion was to require Harry Hanley, Receiver appointed in the Supreme Court, Nassau County in a foreclosure action of Frederick Russell against John M. Russell, Inc., the bankrupt, to file his accounting in the bankruptcy court.

The motion was heard before Hon. Matthew T. Abruzzo, in the United States District Court, Eastern District of New York. An order was entered by Judge Abruzzo denying the motion on February 10, 1942. The appeal was taken by notice of appeal dated March 7th, 1942.

The trustee appeared by David Haar, Esq., as his attorney, and the appellee, Harry Hanley, as receiver, appeared by Richards, Smyth & McGrath, Esqs.

There has been no change of either parties or attorneys in this proceeding.

[fol. 2] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of JOHN M. RUSSELL, INC., Bankrupt

NOTICE OF MOTION

SIR:

Please take notice, that upon the annexed petition of Allan D. Emil, the Trustee herein, duly verified the 15th day of August, 1941, and on the proceedings had herein,

the undersigned will move this Court at a bankruptcy term thereof, to be held in the Post Office Building, in the Borough of Brooklyn, City of New York, on the 22nd day of August, 1941, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order requiring Harry Hanley, Receiver appointed by the Supreme Court, Nassau County in the foreclosure action of Frederick Russell against John M. Russell, Inc., the bankrupt herein, to file his accounting of receipts and disbursements with the referee in charge of these proceedings and be subject to all the rights and obligations with respect to such accounting as if he were a receiver of this court, and for such other and further relief as in the premises may seem proper.

Dated, New York, August 15th, 1941.

Yours, etc., David Haar, Attorney for Trustee, 270 Broadway, New York City.

To John P. McGrath, Esq., Attorney for Harry Hanley, Receiver, 66 Court Street, Brooklyn, N. Y.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION OF ALLAN D. EMIL, READ IN SUPPORT OF MOTION

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petition of Allan D. Emil, respectfully shows:

1. Your petitioner is the trustee of the above named estate, having been duly appointed on the 29th day of November, 1940 and having qualified by filing the bond required.

2. At the time of the filing of the petition in bankruptcy, the bankrupt was the owner of a certain apartment house completed about two or three months before, and located at 150 South Middle Neck Road, Great Neck, L. I. Likewise at that time there was pending a suit in foreclosure on behalf of a third mortgagee, who held a mortgage of $16,000 which was then past due.

3. In the course of the foreclosure action, the Supreme Court in Nassau County appointed Harry Hanley, Esq.,

as receiver of the rents and profits of the building pending the foreclosure suit.

4. Your petitioner is informed by Mr. Haar that the judgment of foreclosure and sale in which Mr. Hanley was appointed receiver, was entered some time ago, and the sale was scheduled for August 6th, 1941, and that on motion made by the party who claims to be the owner of the property, by reason of a sale held under a foreclosure of mechanics' liens, the sale under the judgment of foreclosure of the third mortgagee was postponed until August 14th, 1941.

[fol. 4] 5. Your petitioner is informed that on the day prior to August 14th, 1941, the plaintiff in the action seeking to foreclose a third mortgage, and for which a judgment of foreclosure and sale have already been entered, transferred the judgment by assignment or otherwise to some person or parties unknown, and that the sale was thereupon abandoned.

6. A prior motion on behalf of the receiver to settle his account in the Supreme Court came on for hearing on August 11th, 1941, but after argument in open court it was withdrawn. It is now apparent that it is necessary to settle the account of the receiver who, as I have been informed, has about $6,000.00 in his possession, subject to the commissions of the receiver and compensation of his counsel.

7. It is therefore obvious that if the motion made by Mr. Hanley, above referred to, is for an order passing his account, the motion is premature; the receiver has not yet completed his duties in administering the property pending the sale, and the transfer of title to a purchaser by Referee's deed.

8. Your petitioner has been informed by his attorney, Mr. Haar, that the attention of the receiver's attorney has been called to that part of the Bankruptcy Law, which requires a State Court receiver, who administers property in actual, or constructive possession of the bankruptcy court after the filing of the petition in bankruptcy, to account for receipts and disbursements in connection with the property of the bankruptcy Court. Mr. Haar informs your petitioner that he has written twice to the attorney

for the receiver, requesting him to file such an accounting with the Referee, Mr. Fluckiger. In spite of such requests, Mr. Hanley, the receiver, has nevertheless made this motion above referred to, presumably ignoring the bankruptcy law [fol. 5] and the jurisdiction of this court, and proceeding in the State Court which appointed him as receiver, with his accounting.

9. Your petitioner is informed and verily believes that the second and third mortgages are under the control of the present owner of the property, who bought it on the foreclosure of some mechanics liens which had been filed against the property shortly before the filing of the petition in bankruptcy. The sale on the foreclosure of the mechanics lien judgment took place some time in February or March of 1941.

10. This being the situation, to wit, that the owner is in control of the judgment on the foreclosure brought by the third mortgagee, and is also the owner of the second mortgage, which mortgagee also started a foreclosure suit, it must be obvious to the Court that the owner will do nothing to bring on either judgment, and certainly not the third mortgagee's judgment of foreclosure, to a sale. Undoubtedly, he will make an effort to take whatever moneys the receiver has into his own possession, to the exclusion of the rights of your petitioner as trustee. Indeed, Mr. Haar, my attorney, informs me that that suggestion was made in open court on the argument on August 11th, 1941 in the Supreme Court, when the receiver's account was presented for settlement but was withdrawn.

11. The receiver's accounting of the receipts and disbursements as presented to the Supreme Court on the motion above referred to, shows that he was appointed on August 17th, 1940, but did not take possession of any moneys, to wit, did not collect any rents from the property until after September 1st, 1940. The petition in bankruptcy was filed August 31st, 1940.

[fol. 6] 12. Under the circumstances, your petitioner believes that under the Bankruptcy Act, as amended, in 1938, and under the decisions of the Supreme Court and other courts interpreting the rights of a trustee in bankruptcy with respect to moneys received by a receiver appointed by a State Court but who collects moneys from the bank-

rupt's property after the filing of the petition, that such a receiver should be required to account in the Bankruptcy Court for such receipts and disbursements.

Wherefore, your petitioner respectfully prays that an order be made requiring Harry Hanley, Receiver appointed by the Supreme Court in Nassau County in the foreclosure action of Frederick Russell, third mortgagee, against the bankrupt above named, to file his accounting of receipts and disbursements with the referee in charge of these proceedings, and be subject to all the rights and obligations with respect to such accounting as if he were a receiver of this court, and your petitioner prays for such other relief as may be proper.

Dated, New York, August 15th, 1941.

Allan D. Emil, Petitioner.

(Verified August 15, 1941.)

[fol. 7] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN P. MCGRATH, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of Kings, ss:

JOHN P. MCGRATH, being duly sworn, deposes and says that he is an attorney and counsellor-at-law duly admitted to practice in the Courts of the State of New York and in this Court. That your deponent is the attorney for Harry Hanley, Receiver of the rents and profits of a certain apartment building located in Great Neck, New York, the fee title to which was in John M. Russell, Inc., at the time of the appointment of said Harry Hanley.

That the said Harry Hanley desires the record herein to indicate that he appears specially, for the sole and exclusive purpose of contesting the jurisdiction of this Court, and for that purpose alone begs leave to submit the following facts:

That on August 17th, 1940, an order was made by the Honorable Algeron I. Nova, Justice of the Supreme Court of the State of New York, appointing said Harry Hanley

Receiver of the rents and profits of a three-story forty-five family apartment building located at Great Neck, Nassau County, New York. That the said order was made in an action brought in the Supreme Court of the State of New York, Nassau County, by Frederick Russell, as plaintiff, against John M. Russell, Inc., and others, as Defendants. That the said action was brought to foreclose a mortgage in the sum of Sixteen Thousand Nine Hundred Dollars ($16,900) upon the said property, for non-payment of the principal thereof and of certain interest and taxes past due thereon. That prior to August 13th, 1940 the said action had been commenced by the service of the summons and [fol. 8] complaint therein upon John M. Russell, Inc. That the petition in bankruptcy of John M. Russell, Inc. was not filed until August 31st, 1940, and hence the State Court had had jurisdiction of the foreclosure action and had taken possession of the apartment building at least two weeks before the filing of the petition in bankruptcy.

That Harry Hanley duly qualified as said Receiver by filing a bond in the sum of Twelve Thousand Dollars ($12,000), and has been in actual possession of the mortgaged premises since August 17th, 1940, and actually collected rents from said premises during the month of August, 1940, and during every month thereafter, to and including the month of August, 1941.

That at the time of the commencement of the foreclosure action in which Harry Hanley was appointed Receiver, there were many mechanics lienors who held liens on the property and who had not been paid. An action in the Supreme Court, Nassau County, was brought by one or more of these lienors to have their liens determined and for a foreclosure and sale of the property in order to satisfy these liens. Deponent is informed that said action was reduced to judgment, and that a sale of the mortgaged premises was had under foreclosure in the said action brought by the said mechanics lienors. That the sale was held on or about February 21st, 1941. At said sale the premises were bid in by a corporation known as Apartment Investing Corporation for the sum of about Twenty Thousand Dollars ($20,000). At that time, upon information and belief, the bankrupt estate was effectually divested of any and all interest which it may have had in the said mortgaged premises. Said foreclosure sale was

subject to the mortgage under foreclosure in the action in which Harry Hanley is Receiver, and also to two prior mortgages.

Meanwhile, the action brought by Frederick Russell, in which Harry Hanley is the Receiver, continued, and upon [fol. 9] information and belief judgment was entered therein on or about June 13th, 1941. The premises were duly advertised for sale pursuant to said judgment, and were scheduled to be sold August 6th, 1941. The sale was adjourned once, to August 14th, 1941. Before the said sale was actually held, and on August 13th, 1941, deponent was informed and verily believes that the judgment in said action was paid and satisfied, and that this action was to be terminated subject only to the continuing jurisdiction in the Supreme Court of the State of New York, Nassau County, to settle the account of Harry Hanley, its Receiver, and direct the manner of distribution of the funds in his hands.

That during the course of the receivership Harry Hanley collected rents aggregating $30,533.05 and made disbursements aggregating $25,668.28, leaving a balance in his hands of $4,864.77, subject to his claim for commissions in the sum of $1,526.65 and the claim of his counsel for services in the sum of $1,000. Deponent is advised and verily believes that since the foreclosure action was commenced and the Receiver appointed prior to the filing of the petition in bankruptcy, the State Court obtained jurisdiction of the said foreclosure action for all purposes, and that jurisdiction to administer the receivership, control the expenditures of the Receiver and settle his accounts and direct his discharge are part and parcel of the State Court's jurisdiction in the action, and that the Receiver is within the exclusive control of the State Court. The Trustee in Bankruptcy and his attorney have pointed out to your deponent that under Section 69(d) of the Bankruptcy Act, Receivers in the State Court are required to file their accounts in the Bankruptcy Court. Deponent construes this statute to mean Receivers of the general assets of a bankrupt, and it does not include a Receivership created in connection with the enforcement of a lien upon a specific parcel of real property. The Receiver [fol. 10] here has nothing whatever to do with the general assets of the bankrupt, but is merely the arm of the State Court, aiding and preserving a lien clearly within the con-

trol and under the jurisdiction of the State Court. Deponent has been advised of no decision of any Federal Court construing the Bankruptcy statute in the manner contended for by the Trustee in Bankruptcy, and diligent research by deponent has failed to disclose any such precedent.

The Receiver has already petitioned the Supreme Court, Nassau County, for a settlement of his accounts upon due notice to the Trustee in Bankruptcy and to all parties who appeared in the State Court action. This application is returnable on Friday, August 22nd, 1941, and it is anticipated that the State Court will make an order at that time settling the Receiver's accounts and directing his discharge. The Receiver is apprehensive that if this Court decides that it has jurisdiction in the premises and directs the Receiver to account in this Court, such determination may result in conflicting decisions as between the two Courts as regards the Receiver's stewardship, all of which will undoubtedly result in confusion and may impose upon the Receiver personally a burden of liability which would be unjust.

Verily, the Bankrupt Estate has no interest whatever in that portion of the receivership which transpired subsequent to the sale in February, 1941, which divested the Bankrupt Estate of all interest in the mortgaged premises. The State Court will have before it upon the Receiver's petition for settlement of his accounts the question as to the proper disposition of any balance in the Receiver's hands which is fairly allocable to rent collections from August 17th, 1940 to February 21st, 1941, during which time the Bankrupt Estate was still the record owner of the fee. If it is determined by the State Court that any part of those [fol. 11] rents is payable to the Trustee in Bankruptcy, the Receiver will of course make payment accordingly, and those funds will then come within the jurisdiction of the Bankruptcy Court.

Insofar as the allegations of the petition of the Trustee in Bankruptcy on this application are in conflict with the foregoing statement of facts, such allegations are denied by the Receiver.

For the foregoing reasons deponent contests the jurisdiction of this Court to make the order prayed for and respectfully asks that the motion be denied.

John P. McGrath.

(Sworn to August 21, 1941.)

IN UNITED STATES DISTRICT COURT

REPLY AFFIDAVIT OF DAVID HAAR, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

David Haar, being duly sworn, says:

I am the attorney for Allen D. Emil, the trustee of the above named bankrupt's estate, and submit this affidavit at the request of the Court. However, in so submitting it, I must respectfully protest against the receipt of any affidavits at this time which tend to show what took place in the accounting proceedings initiated by the receiver in the State Court. It is my opinion, which is submitted respectfully herein for whatever it may be worth, that the Court should decide this motion on the papers as [fol. 12] submitted on August 22nd, 1941, when the motion was presented to the Court for decision, argued and submitted.

However, since the Court has requested it, I state the following facts as briefly as I can, and from my recollection of what occurred:

In the first place, the Court's attention should be called to the fact that in the accounting it appeared that whatever rents were collected by Mr. Hanley, as Receiver, were collected beginning with September 1st, 1940, which is a date subsequent to the date of the filing of the petition against the bankrupt. Mr. Hanley was therefore in possession of property forming part of the assets of this estate. He was collecting rents which were the proceeds of property forming part of the assets of this estate. He was disbursing these rents, not in accordance with the Bankruptcy Act in such cases made and provided.

At the very outset of the hearing before Hon. Norman S. Dike, Official Referee, I stated that I was participating in the hearing under protest, and that it was my opinion at that time that the matter should be heard by the Bankruptcy Court, because the receiver was accounting for property and moneys belonging to the Bankruptcy Court. However, the hearing continued. Almost at the very outset, after only a few questions had been asked of the Receiver, Judge Dike stopped the examination which I

was conducting, with the remark, in substance, if not in words, that the receiver showed himself to be most incompetent, and that it would be an act of God if no loss was sustained as a result of his so-called administration.

The next witness on the stand was Mr. Shelley, to whom, apparently, the receiver had left the administration of the estate over which he had been appointed receiver. Mr. Shelly had been the superintendent of construction on behalf of the bankrupt. He admitted during the course of cross examination, that he was the principal, if not the sole [fol. 13] stockholder of a corporation that bought in the property at the end of February, 1941, at a foreclosure of mechanics liens. He also admitted that it was this corporation, to wit, the Apartment Investing Corp., that had paid off the amount due on the mortgage under foreclosure. Mr. Shelley was also the man who had received commissions from the receiver for rent of various apartments in the premises, altho no order had been made authorizing the receiver to retain a real estate agent for that purpose.

These are some of the outstanding facts adduced during the course of the hearing. There are others which need not now be referred to.

It appeared from the hearing, also, that the receiver's counsel admitted that the trustee was entitled to a refund of $60.00 of a deposit, $75.00 collected as rent from a man by the name of Kaufman, and $79.50 collected as rent from a man by the name of Welcker. It also appeared during the hearing, that the officer and stockholder of the bankrupt, Mr. Russell, was permitted to stay in an apartment, the rent of which was $67.50 per month, for a period of at least six months without paying any rent at all.

May I interrupt here to state that the point in issue, insofar as the trustee was concerned, was the ascertainment of the amount of rents collected or which should have been collected from September 1st, 1940 to February 28th, 1941, and the amounts properly disbursed within that period. The reason that period is taken is because the trustee took title as of August 31st, 1940, when the petition was filed and he was divested of title as of February 28th, 1941, when the sale under the foreclosure of the mechanics liens was held.

It appeared that during the month of February, Mr. Shelley bought a considerable amount of fuel oil, and

he admitted that a good deal of it was left on February [fol. 14] 28th, 1941. His counsel conceded that we were entitled to a credit of about $60.00 for that. It likewise appeared that Mr. Shelley had been paid commissions of $617.70, without authority and for no reason whatever that I could see from the evidence. It also appeared that school taxes were paid before February 28th, 1941 for the whole six months, as well as town taxes, amounting to about $800.00, the burden of which should have been taken over by the Apartment Investing Corp. who took title on February 28th, 1941.

As a result of the hearing, the Official Referee overruled every single objection interposed by the trustee. He allowed the receiver $1526.65 for his commissions as receiver, in spite of the characterization of him as an incompetent administrator, made in open court. He allowed his attorneys the sum of $1,000 for their fees, without taking into consideration the allocation of services rendered before and after February 28th, 1941, and he directed the balance to be paid to Apartment Investing Corp., which is Shelley's corporation.

These are some of the outstanding facts disclosed during the course of the hearings and in the order made by the Official Referee. As a result of that order, in spite even of the admissions made on the record that the trustee is entitled to some reimbursement, the trustee got nothing.

Now that this Court has these facts before it, it can see the purpose of the amendment passed in 1938 requiring receivers who administer property after bankruptcy intervenes, to make their accounting in the Bankruptcy Court. It was with that in mind, and because the law requires it that I made the motion on behalf of the truste last August, which motion is still pending.

It is my opinion that in spite of the so-called accounting and the order made in the State Court approving it in all respects and overruling every single objection of the [fol. 15] trustee to it, that this Court not only has power, but has the duty to require this receiver to give an accounting in the Bankruptcy Court, because the property he handled was bankrupt property in the constructive, if not the actual possession of the Court.

David Haar.

(Sworn to January 6, 1942.)

Answering Affidavit of John P. McGrath, Read in Opposition to Motion

State of New York,
County of Kings, ss:

John P. McGrath, being duly sworn, deposes and says:

That he is a member of the firm of Richards, Smyth & McGrath, attorneys for Harry Hanley, receiver of the rents and profits of certain real property located at Great Neck, Nassau County, New York, appointed in an action in the New York Supreme Court, Nassau County, entitled. Frederick Russell, plaintiff, against John M. Russell, Inc., et al., defendants. That the above named bankrupt was the owner of the equity of said real property. That the said court action was brougt to foreclose a third mortgage on the real property. That the said receiver acted from August 17th, 1940 to early August, 1941.

By notice of motion bearing date August 14th, 1941, the receiver made a motion in the New York Supreme Court, returnable August 22nd, 1941, for an order settling his ac- [fol. 16] counts and discharging him. Thereafter, and by notice of motion bearing date August 15th, 1941, the Trustee in Bankruptcy applied to this Court by motion returnable August 22nd, 1941, for an order requiring Harry Hanley, as receiver, to file his account in this court. Both motions were returnable on the same day. When the motion before this Court was called for argument, David Haar, Esq., appeared as attorney for the Trustee in Bankruptcy and deponent appeared as attorney for the receiver. Deponent pointed out that the accounting had been submitted to the New York Supreme Court for settlement. The Hon. Matthew T. Abruzzo, United States District Judge, before whom the Trustee's application was argued, indicated his inclination to permit the State Court to retain jurisdiction and determine the receiver's account and reserved decision on the Trustee's application.

Meanwhile, the Trustee in Bankruptcy had interposed objections to the receiver's account in the State Court and an order was made by Mr. Justice Froessel, on August 29th, 1941, referring the issues raised by said objections

to an Official Referee of the Supreme Court, to hear and determine the account and to pass upon the objections.

Thereafter, hearings were held before Hon. Norman S. Dike, Official Referee, on the 21st and 23rd days of October, 1941, at which time the issues raised by the Trustee's objections were fully heard. Thereafter and on November 28th, 1941, the said Official Referee, Hon. Norman S. Dike, made a decision overruling the objections interposed by the Truste and directing that the balance in the hands of the receiver, after payment of the receiver's statutory commissions and the fee of his attorneys, be paid over to Apartment Investing Corporation, the purchaser of the property at the mechanic's lien foreclosure sale in February, 1941. The Official Referee found, among other things that all rights of the bankrupt in the real property were [fol. 17] cut off as of February 24th, 1941 and that, on that day, there was a deficit in the receiver's account; that the balance of rents in the receiver's account in August, 1941 had accrued subsequent to the extinguishment of the bankrupt's interest in the property and should, therefore, be paid to the new owner.

That an order was entered on the decision of the said Official Referee, which order bears date December 3rd, 1941. Said order overrules the objections of the Trustee in Bankruptcy and approves the account of the receiver and directs his discharge and the cancellation of his bond.

Deponent respectfully submits that the issues raised by the Trustee in Bankruptcy were fully tried; that the Trustee was adequately represented upon the hearings and presented all his proof and that the determination of the New York State Supreme Court was made after a full and complete consideration of the merits and that this Court should not interfere therewith or require any further action on the part of the receiver.

This affidavit is submitted in accordance with the request of the Court, made in the presence of the attorney for the Trustee.

Wherefore, deponent prays that the motion of the Trustee in Bankruptcy be denied.

John P. McGrath.

(Sworn to January 6, 1942.)

[fol. 18] IN UNITED STATES DISTRICT COURT

OPINION OF ABRUZZO, D. J.

This is a motion instituted by the Trustee in bankruptcy for an order compelling the Receiver appointed in the Supreme Court of the State of New York in a foreclosure action to file with the Referee in this Court an accounting of his receipts and disbursements.

One, Harry Hanley, was appointed Receiver of the rents and profits of certain real property located at Great Neck, Nassau County, New York pursuant to a mortgage foreclosure action commenced in the Supreme Court of the State of New York, Nassau County. The bankrupt herein was the owner of the equity in the said property.

On Aug. 14, 1941, the receiver made a motion in the New York Supreme Court, returnable Aug. 22, 1941, for an order settling his accounts and discharging him. Thereafter, the trustee made the present motion in this Court.

In the Supreme Court of the State of New York, the trustee interposed objections to the receiver's accounting. As a result of the issues raised by these objections, the matter was referred to an Official Referee of the Supreme Court for determination. Hearings were held before the Official Referee on the 21st and 23d days of Oct. 1941, at which time the issues raised by the trustee's objections were fully heard. On Nov. 28, 1941, the Official Referee, in his decision on the motion, overruled the objections interposed by the trustee. An order on that decision was entered on Dec. 3, 1941. It is evident that the issues raised by the trustee were fully tried and a determination was made on the merits.

The trustee has cited Chapter 11, Sec. 2, subdiv. 21 and Chap. 7, Sec. 69, subd. d in support of this motion.

The latter section of the Bankruptcy Act seems to confer authority on this Court to compel a receiver or trustee, not appointed under the act, to account to the bankruptcy Court under which the proceeding is pending, for any action taken by him subsequent to the filing of the petition [fol. 19] in bankruptcy. The petition herein was filed on Aug. 31, 1940 and the receiver was appointed prior to that or on Aug. 17, 1940, for the purpose of collecting the rents of a particular piece of property. He was not a receiver of the general assets of the bankrupt and

was under the direct order of the New York Supreme Court. It is doubtful whether Sec. 69, sub. d of the act, affects a receiver appointed in a State court for the sole purpose of collecting rents from a specific parcel of land owned by the bankrupt, and disbursing the funds for the protection of the property.

Considering the two sections of the Bankruptcy Act cited by the trustee, it appears that in the event that this Court granted the trustee's motion, the receiver's accounting would be filed and the same objections would be interposed by the trustee. This would afford him two trials of the same issues already determined in the Supreme Court of the State of New York. A fair interpretation of the Bankruptcy Act leads to the conclusion that it was not intended to give two trials of the same issues. As was said in re: *National Motorship Corp.*, 96 Fed. 2d 88, "* * * state court's disposition was subject to assent of the bankruptcy court" indicating that full faith and credit can therefore be given by this court to the determination of the Supreme Court of the State of New York.

This motion is denied. Settle order on two (2) days notice.

M. A., U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER APPEALED FROM

Allen D. Emil, trustee in bankruptcy for the above named bankrupt having moved this Court for an order requiring Harry Hanley, receiver appointed by the Supreme Court, Nassau County, in the foreclosure entitled, "Frederick Russell against John M. Russell, Inc., et al.," to file his accounting of receipts and disbursements with the Referee herein and to subject himself to such rights and obligations with respect to such accounting as if he were receiver of this Court, and said motion having duly come on to be heard before me,

Now, upon the petition of Allen D. Emil, verified August 15th, 1941, the notice of motion dated August 15th, 1941, the affidavit of David Haar, Esq., verified January 6th, 1942, read in support of said motion, and the affidavits of John P. McGrath, verified respectively August 21st, 1941

and January 6th, 1942, in opposition thereto, and after hearing David Haar, Esq., attorney for the trustee, in support of said motion, and Richards, Smyth & McGrath, Esqs. (John P. McGrath, Esq., of counsel) attorneys for Harry Hanley, as receiver, in opposition thereto, and the undersigned having prepared and filed a decision herein, it is

On motion of Richards, Smyth & McGrath, attorneys for Harry Hanley, as Receiver,

Ordered that the said motion is in all respects denied.

Dated, Brooklyn, N. Y., February 10th, 1942.

M. T. Abruzzo, U. S. D. J.

[fol. 21] In United States District Court, Eastern District of New York

In the Matter of John M. Russell, Inc., Bankrupt

Notice of Appeal

Sirs:

Please take notice, that Allan D. Emil, the trustee of the above named bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order made herein on the 10th day of February, 1942, and entered in the office of the Clerk of the United States District Court, Eastern District of New York, which order denies the motion made by the Trustee requiring Harry Hanley, receiver appointed by the Supreme Court, Nassau County, in the foreclosure entitled "Frederick Russell against John M. Russell, Inc., et al." to file his accounting of receipts and disbursements with the Referee herein, and he appeals from each and every part of said order.

Dated, New York, March 7th, 1942.

Yours, etc., David Haar, Attorney for Trustee, 270 Broadway, New York City.

To Richards, Smyth & McGrath, Esqs., Attorneys for Harry Hanley, 2650 Atlantic Avenue, Brooklyn, New York.

[fol. 22] In United States District Court, Eastern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is the record on appeal in the above entitled matter as agreed upon by the parties.

Dated, New York, April 1, 1942.

David Haar, Attorney for Appellant. John P. McGrath, Attorney for Appellee, Appearing Specially.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1941

No. 306

(Argued June 4, 1942. Decided July 29, 1942)

Allan D. Emil, Trustee, Appellant,

v.

Harry Hanley, Receiver, Appellee

Appeal from an order in bankruptcy of the District Court for the Eastern District of New York, denying the petition of a trustee in bankruptcy praying that a receiver, appointed by a state court in a foreclosure suit, should account to the referee.

Before L. Hand, Augustus N. Hand and Clark, Circuit Judges

David Haar for the appellant.
Francis A. McGrath for the appellee.

Opinion

[fol. 25] L. Hand, *Circuit Judge:*

This is an appeal from an order in bankruptcy which denied a motion of the bankrupt's trustee asking that a re-

ceiver in foreclosure appointed by the state court should account to the referee. The case was heard upon petition of the trustee with supporting and answering affidavits in which the following state of facts appeared. The petition in bankruptcy was filed on August 31, 1940 and the petitioner was appointed trustee in the following November. The bankrupt owned an apartment house which had been completed two or three months before (whether it was its only property or not does not appear), upon which there were three mortgages. At petition filed, an action to foreclose the third mortgage in the state court was pending, in which Hanley, the respondent, had been appointed receiver on August 17, 1940. He qualified on that day, collected the rents for the month of August and has collected those which fell due thereafter. Judgment of foreclosure was entered on June 13, 1941, the sale under which was set for August 6 and adjourned to August 14. On the 13th a corporation, known as Apartment Investing Corporation, paid and satisfied the mortgage, leaving nothing further to be done in the foreclosure suit except to pass the receiver's accounts; the same corporation had already on February 21, 1941, bought in the property under a judgment of foreclosure upon several mechanics' liens, junior to the mortgage. On August 14, 1941 the receiver moved in the state court for an order passing his accounts, and on the 15th the trustee made the motion now at bar to compel him to account in the bankruptcy court. Both motions were returnable on the 22nd, on which day the trustee appeared in the state court to protest against its jurisdiction; he was overruled, and on December 3, 1941, the receiver's accounts were passed, allowances were made to him and to his attorney, [fol. 26] he was discharged and his bond was cancelled. The district judge held this motion open meanwhile and denied it on February 10, 1942. The outcome of the appeal turns on whether §2(a) (21) and §69(d) of the Bankruptcy Act, which were added in 1938, gave exclusive jurisdiction to the bankruptcy court over the accounts of a receiver in foreclosure.

As soon as the receiver qualified, all the rents were sequestered for the benefit of the third mortgagee. That is the law of the state (*Sullivan* v. *Rosson*, 223 N. Y. 217) and the state law governs. *In Re Humeston*, 83 Fed. (2d) 187 (C. C. A. 2). The trustee questions whether the receiver is to be regarded as in possession before petition filed—Au-

gust 31, 1940—because he collected no rents until September 1st. As we have said, he qualified on August 17th, but he never took possession because he could not, the property being held on leases. Even if he could have taken possession, but failed to do so until September 1st, it would not have mattered, for priority between courts in point of jurisdiction depends, not upon the day when the property comes into their possession but upon that of the commencement of the first suit in which possession can be taken. *Farmers Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61; *Palmer* v. *Texas*, 212 U. S. 118, 129; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. Before the addition of §2(a) (21) and §69(d) there was therefore no doubt that the jurisdiction of the bankruptcy court over foreclosure receivers—including the power to pass their accounts—depended upon the petition's being earlier than the suit. *Isaac* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Straton* v. *New*, 283 U. S. 318; *In Re Greenlie-Halliday Co.*, 57 Fed. (2d) 173 (C. C. A. 2); *Damel* v. *Wilson-Weesner-Wilkinson Co.*, 109 Fed. (2d) 364, 366 (C. C. A. 6). Such a receiver is quite unlike a re- [fol. 27] ceiver appointed in an "equity receivership" (*Duparquet H. & M. Co.* v. *Evans*, 297 U. S. 216), or a statutory state insolvency proceeding, both of which are entirely superseded by a later bankruptcy proceeding. *Straton* v. *New*, *supra*, 327. Thus, the only question is whether the sections added in 1938 assimilated the two receiverships.

There is every antecedent reason to say that they did not. They certainly contain no intimation of intention to subject pending foreclosure suits as a whole to the jurisdiction of the bankruptcy court; so far as appears, the state court may press such suits to judgment, may sell the property and distribute the proceeds; indeed this can hardly be questioned. If so, it would be altogether anomalous to divorce from the land itself the income which accrues *pendente lite*. Indeed, when a court takes possession of mortgaged land by its receiver, it in effect merely anticipates its final action, acting in harmony with the general axiom that equity regards as done what ought to be done; if all the necessary steps could be taken together in piepowder fashion, the property would be sold, the buyer would begin to receive the rents at once, and the mortgagee the interest upon the purchase price. The receivership is the nearest substitute; the rents are security

just as the land is security from the time when the court intervenes; they become part of the mortgaged *res* because only so can the mortgagee be protected during the inevitable delay. For this reason it is extremely unlikely that when Congress left to the state courts jurisdiction over the land it should have intended to separate the rents. Indeed, the receiver is as much an arm of the court as the master whom it appoints to conduct the sale; it is as unwarranted an invasion of its power to compel the receiver to account as to compel the master. Either the bankruptcy should supersede the whole suit, as it does in the case of a winding [fol. 28] up, or it should not touch it at all; the tail goes with the hide. As Professor Moore has well said (Collier on Bankruptcy, 14th Edition, pp. 307-309), "Here it will be noted that the receivership is a mere incident of the lien or claim which the non-bankruptcy court had undertaken prior to bankruptcy and that the property, upon the institution of the proceedings was in *custodia legis* of the non-bankruptcy court. And it would appear that it was not the intent of clause (21) to change the established law in that respect."

The only even plausible objection appears to us to rest upon the exception of proceedings under Chapters X and XII. The argument drawn from this is that it shows that the section applies to those chapters and that it must therefore *pro tanto* include receivers in foreclosure. This is certainly true as to Chapter X because one of the grounds for an involuntary petition is the pendency of a foreclosure suit or possession by a mortgage trustee, though the mortgage must cover the "greater portion of the property of the corporation." §131(3) and (4). Moreover, the "plan" in Chapter X—§216(1)—and the "arrangement" in Chapter XII—§416(1)—must include some modification of a valid mortgage. Yet this argument is not convincing, for there is nothing anomalous or inconsistent in saying that §2(a) (21), when applied to proceedings under these chapters includes foreclosure receivers, but does not when applied to "straight bankruptcy"—liquidation. Since the section merely granted a new remedy and was not intended to enlarge the jurisdiction of the bankruptcy court, the distinction was one which we should expect and which was indeed necessary. This is so because, even as to valid mortgages and other liens, proceedings under these chapters are supersessive, just as "straight bankruptcy" is supersessive as to

state insolvency proceedings or "equity receiverships." [fol. 29] The bankruptcy court should be able summarily to reduce to possession all property the interests in which it may have to adjust; it is only when the court has no power to do so that a state court should be allowed to retain a custody already acquired; but there is every reason when it has not, that the state court's jurisdiction should be respected. A state court can foreclose as well as a bankruptcy court; indeed, it is presumptively better fitted to do so for it is more apt to be familiar with the questions involved. For these reasons we think that the words, "receivers" and "trustees," may be read distributively, covering those occasions for which the new remedy is appropriate; that is, those in which under the previous law the bankruptcy court had exclusive jurisdiction.

We are not sure what Congress meant by the added phrase: "agents authorized to take possession of or liquidate a person's property"; but whatever those words include, it does not disturb the argument, for they should be understood to subject to summary dispossession only those "agents" who hold property that must be administered in the bankruptcy proceeding. However, it must be confessed that consistently one would have expected the exception also to have included proceedings under §77 to reorganize railroads, in which valid liens can be modified, §77(b)[2](1). At first blush it is hard to see why the summary remedy granted should have been cut off at four months in such proceedings. Possibly these were forgotten in the drafting; possibly it was thought that the remedy would not be likely to be invoked in the case of railroads anyway, since they constitute a very special problem. But, whatever the reason, the omission offers no obstacle to our conclusion, for the exception as to Chapters X and XII remains applicable as it stands, even if consistently it should have been broader. For these reasons we conclude that §2(a) (21) did not support the trustee's petition.

[fol. 30] That being true, little need be added as to §69(d). The phrase, "receiver or trustee, not appointed under this Act", is almost in the same words as §2(a) (21) and the variance cannot have indicated any change in intent; as the House report said, the section was intended as a guide for "equity receivers." Report #1409, 75th Congress, First Session. It made them accountable to the bankruptcy court, whether or not the trustee moved to dispossess them under

§2(a) (21); it required them to file a schedule of their property; it even forbade their disbursing any money without the bankruptcy court's consent. If this was meant also to cover foreclosure receivers in "straight bankruptcy," a revolutionary change, quite needless and galling to the state court's dignity, was too well hidden with what are at best very equivocal words.

Order affirmed.

Dissenting Opinion

Clark, *Circuit Judge* (dissenting):

I think that, under the express provisions of the Chandler Act, now appearing as Bankruptcy Act, §§2a(21), 69d, 11 U. S. C. A. §§11a(21), 109d, as well as by virtue of its policy and purpose, this receiver is subject to the supervision of the bankruptcy court as to his allowances and disbursements. The contrary view is arrived at only by a most violent contraction of the statutory language to make it fit into a framework of supposedly clear prior case law. As will appear from the discussion hereafter, I find the earlier precedents not clear, but highly confused, as to the meaning of "receiver" in applying the earlier bankruptcy act. But in any event, I believe it is a mistake to approach a problem as to the scope of new bankruptcy provisions supplied by the Chandler Act with an attitude of assimilating [fol. 31] them into pre-existing law. That Act represents a full-scale overhauling of the several types of debtor proceedings. Where the sections are entirely new, broad, and, on the surface, at war with old law, I think it much better to assume that the meaning to be attributed to them is one which squares with the general purpose of the Act, even if this should involve some departure from past case law.[1]

It is especially appropriate to approach §2a(21) in this manner because of its unique nature. This paragraph is

[1] Consider, for example, that *Adams v. City Bank & Trust Co. of Macon*, 5 Cir., 115 F. 2d 453, 134 A. L. R. 1215, certiorari denied, 312 U. S. 699, 61 S. Ct. 739, 85 L. Ed. 1133, has been strongly criticized as an instance where previous law was hung on to in the face of a new wording of the statute. See 3 Collier on Bankruptcy, 14th Ed. 1941, 911-916; 29 Calif. L. Rev. 522; 41 Col. L. Rev. 512; 36 Ill. L. Rev. 783.

not quoted in its entirety in the opinion. It must, however, be considered in full, for it is not fairly represented by short excerpts. It is one of a considerable number of paragraphs conferring extensive jurisdiction on courts of bankruptcy. It authorizes such courts to "require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control" to the bankruptcy receiver or trustee or to the debtor or other person entitled to it under an arrangement or plan under the Act, "and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required, except in proceedings under chapters 10 and 12 of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of [fol. 32] bankruptcy." There follow important provisions as to the proceedings upon the accounting by virtue of which the bankruptcy court shall re-examine and determine the propriety and reasonableness of the receiver's disbursements to himself and to others for services and expenses; and "unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to" the bankruptcy proceeding, the court shall surcharge the receiver for excessive or improper charges.

Prior to 1938 there was absolutely nothing in the Bankruptcy Act authorizing this sort of action. Receivers, assignees, and trustees were replaced, but this was generally done on a theory that, since §3, 11 U. S. C. A. §21, made the appointment of such a person an act of bankruptcy, it was "necessarily implied" that the officer was to be displaced. *Randolph & Randolph* v. *Scruggs*, 190 U. S. 533, 536, 23 S. Ct. 710, 47 L. Ed. 1165; *In re Watts*, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933. In this light, it is obvious that pre-existing law was limited by the necessity of relying on implications.[2] It seems a little strange, therefore,

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[2] It has never even been settled that a foreclosure receiver is not a receiver under §3. A dictum in *Standard Accident Ins. Co.* v. *B. T. Sheftall & Co.*, 5 Cir., 53 F. 2d 40, says that he is not; but in *In re 211 East Delaware Place Bldg. Corp.*,

to interpret a statutory grant of power as if it allowed the court to do only directly what formerly could have been done by indirection without statutory authority.

If the section is approached without such semi-historical preconceptions, it is at once seen that on its face "receiv- [fol. 33] ers" must include receivers in aid of foreclosure because of the proviso allowing for displacement of receivers where Chapters X and XII are involved, regardless of when they were appointed. Under §131(3), (4) of Chapter X, 11 U. S. C. A. §531(3), (4), an involuntary petition may be filed if, as a substitute for an act of bankruptcy under §3, "an indenture trustee or a mortgagee under a mortgage is, by reason of a default, in possession" or "a proceeding to foreclose" is pending. And under Chapter XII, which deals only with real property, the only likely kind of receiver is one to collect rents and profits in foreclosure.[3] The opinion avoids this difficulty by reading "receivers" and "trustees" distributively to cover those receivers which must be included, but excluding all others which under previous law were not subject to displacement.

This "distributive" reading is a deceptively simple solution. Here the essentially conflicting nature of the earlier

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D. C. N. D. Ill., 14 F. Supp. 96, Judge Evans, sitting as a district judge, said that he is. In *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, the Court refused to answer the question. Under the rationale of displacement by implication, it was not even clear under previous law that a foreclosure receiver would not be displaced if appointed within four months of a petition in bankruptcy.

[3] It is said that §2a(21) is not complete because it does not include receivers in railroad receiverships in the proviso eliminating the four months' restriction as to Chapters X and XII. But under §77(a), 11 U. S. C. A. §205(a), the court is given "exclusive jurisdiction of the debtor and its property wherever located," and under §77(i), there is a complete enumeration of the steps to be taken to terminate a receivership once a petition under §77 is filed. It should also be noted that the earlier sections of the Bankruptcy Act have little or nothing to do with railroads, because under §4, 11 U. S. C. A. §22, they are excluded from the class of persons who may become bankrupts.

precedents takes on increased importance. For this reading results in giving "receiver" several meanings in addition to those which the majority concedes are required by the context of §2a(21) itself. For example, a receiver appointed under a creditor's bill was displaced if appointed within four months of bankruptcy, *Miller* v. *Potts*, 6 Cir., 26 F. 2d 851; *Blair* v. *Brailey*, 5 Cir., 221 F. 1, certiorari denied 238 U. S. 634, 35 S. Ct. 938, 59 L. Ed. 1499, but not [fol. 34] if appointed more than four months before. *Blair* v. *Brailey, supra*. The rationale was that displacement followed by implication from the fact that §67, 11 U. S. C. A. §107, outlawed the lien as a fraudulent transfer.[4] Also, a receiver appointed under a stockholder's bill could be replaced no matter when he was appointed, *Miller* v. *Potts, supra; In re Knox Consol. Coal Co.*, D. C. S. D. Ind., 50 F. 2d 248. Must we now read "receiver" as applying to all displacements under the previous rule regardless of the four months' limitation, or do we limit ourselves to reading it to include only such previous law as is not otherwise necessarily altered? If so, §2a(21) has become an empty shell indeed.

There are other types of receiver which must be conjured with. Under the majority opinion, receivers collecting rents under valid mortgages are not covered by §2a(21). Suppose the mortgage is invalid under §§60, 67, or 70, 11 U. S. C. A. §§96, 107, 110? If this differentiation is read into the section, then a broad grant of *jurisdiction* depends on the myriad technical rules of validity arising out of §§60, 67, and 70. Then there are peculiar sorts of receivers whose status was determined under previous law, such as the temporary receiver appointed pending judicial determination of a charge that an indenture trustee had committed fraud. *In re Greyling Realty Corp.*, 2 Cir., 74 F. 2d 734, certiorari denied *Troutman* v. *Compton*, 294 U. S. 725, 55 S. Ct. 639, 79 L. Ed. 1256. Martin Act receivers raise a peculiar problem. Under our decision in *Elfast* v. *Lamb*,

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[4] Of course, this four months' differentiation is written into §2a(21), and it may be said that "receiver" need not have two meanings to accomplish any differentiation. But if some differentiations are covered into the section, it becomes less justifiable to attempt surreptitiously to cover in other differentiations by reading "receivers" and "trustees" distributively.

2 Cir., 111 F. 2d 434, we said that no act of bankruptcy was committed when a Martin Act receiver was appointed. Un- [fol. 35] der previous rules, that would preclude his displacement. But in *In re Koch*, 2 Cir., 116 F. 2d 243, certiorari denied *Hirson* v. *Koch*, 313 U. S. 565, 61 S. Ct. 941, 85 L. Ed. 1524, we intimated that a Martin Act receiver might be displaced because he was a receiver under §2a(21).

The distributive reading thus becomes subject to such exceptions as get written into §2a(21) specifically. A lot of litigation will have to come along before we ever know who is a receiver and who is not under §2a(21).[5] This is the surer because under modern codes generally and New York law in particular an "equity receivership" is not a self-defining term, but is a pure anachronism.[6] A broad, simple provision will soon become encrusted with so many exceptions that no one will ever be sure just what the bankruptcy court's powers are. I prefer to read §2a(21) as it is written and thus settle the issue simply.

It should be noted further that if the statutory term is to be limited to "equity" receivers, and if these are those appointed either to reorganize or to wind up corporations (what else can they mean?), then the provision was already practically out of date when it was written in 1938; for, as is well known, 77B had brought corporate reorganization practice into the bankruptcy aegis.

[fol. 36] Section 2a(21) also speaks of "agents authorized to take possession of or to liquidate a person's prop-

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[5] Compare discussion of receiver in supplementary proceedings in *In re Clement-Rowe Press*, D. C. S. D. N. Y., 42 F. Supp. 209.

[6] Under New York statutes, receivers may be appointed in so many different forms and types of suits as to indicate that this is a general remedy for the preservation of all types and conditions of property—as, indeed, it should be. Needless to say, the term "equity receivership" does not appear. If it be assumed that this refers to a receiver in a proceeding for the dissolution or supervision of the affairs of a corporation, the remedies here are also carefully defined by statute in the General Corporation Law; the main provision stating types of corporate receivers includes foreclosure receivers indiscriminately with the rest. N. Y. General Corporation Law, §150.

erty." The majority opinion concedes doubt as to what this means, but is content again to rely on general bankruptcy rules apart from the section itself. If litigation *ad nauseam* will be necessary to get "receivers" and "trustees" defined, the situation will be even worse with respect to "agents," for this is a kind of person less well known than receivers. The Senate Committee's Report on the Chandler Act referred to them as "custodial or liquidating agents." Sen. Rep. No. 1916, 75th Cong., 3d Sess., 1938, 12. This suggests the wide sweep of the statute, for "custodial agents" certainly connotes agents of limited functions. But must we go on for years trying to find out which custodial or liquidating agents are covered by §2a (21) and which are not? Again, I should prefer to read the section as written, rather than start a process of jerry-building exceptions. This is the conclusion reached in the very recent case of In re Rosenberg 7 Cir. 128 F. (2).

The majority opinion asserts, however, that this distinction so drawn is based on a simple proposition that anyone in possession of property subject to the exclusive possession of the bankruptcy court is displaced, and that any other is not. Of course, this is the very thing which §2a(21) tells us; it is a section giving jurisdiction to the bakruptcy court. But leaving that aside; other objections exist. In the first place, it is no simple matter to know whether or not exclusive jurisdiction exists in the bankruptcy court. I have already alluded to the problem of the invalid mortgage. The force of §2a(21), therefore, seems to me to be to sweep all such property into the bankruptcy court for determination of its status. Secondly, it is not at all settled that the bankruptcy court's power of inhibiting foreclosures begun after bankruptcy, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645, cannot be extended back four months. *Straton* v. *New*, [fol. 37] 283 U. S. 318, 51 S. Ct. 465, 75 L. Ed. 1060, held that where a receiver had been in possession more than four months before bankruptcy, he could not be displaced. Thus, the Supreme Court left undecided the status within four months. Since the rationale of the cases springs from the rule of comity that the court first obtaining jurisdiction retains it, *Straton* v. *New*, *supra*, 283 U. S. at page 322, the fact that §2a(21) grants the bankruptcy court power to extend its jurisdiction backward four months would seem to answer the very question left by the *Isaacs*

and *Staraton* cases, Cf. *Florence Trading Corp.* v. *Rosenberg*, 2 Cir., 128 F. 2d 557, 561.

Further, I think there are many strong reasons of public policy for construing §2a(21) to allow displacement of any person in possession other than the secured creditor himself. The whole purpose of bankruptcy is orderly equitable distribution of a debtor's property. In ordinary bankruptcy, to be sure, Congress has left secured property outside the distribution hierarchy. But we need by no means infer from this that assets of the debtor must be eaten up by exorbitant charges for administering secured assets outside the bankruptcy court. If the cost of a foreclosure receivership were borne by the mortgagee and the equity fully turned over to the bankruptcy court, I would not be quite so solicitous of the bankruptcy power.[7] But to say that unsecured creditors cannot protect their interests by invoking the bankruptcy power in supersession of non-bankruptcy liquidation is to fritter away some of the protection which bankruptcy was designed to afford. Compare [fol. 38] §314, 11 U. S. C. A. §714, of Chapter XI and §614, 11 U. S. C. A. §1014, of Chapter XIII, which allow stay of the commencement or continuation of proceedings to enforce liens, even though neither of these chapters provides for alteration of secured debts. *Cf. Lockhart* v. *Garden City Bank & Trust Co.*, 2 Cir., 116 F. 2d 658, 660. It is anomalous to say that unsecured creditors' rights can be protected thus, but that they cannot be protected by a cutting down of exorbitant expenses of foreclosure. It should also be noted that even if we assume that §2a(21) gives the trustee power of sale over secured property taken over by the bankruptcy court, secured creditors might be a little delayed in realizing on their security, but otherwise would lose nothing. The trustee's only interest is to obtain a sale price over and above the indebtedness, and it is highly unlikely that he would request possession otherwise.

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[7] Though even here, I think the bankruptcy court should have some power, within the limits of four months, to see to it that the bankrupt's equity is not frittered away by a disadvantageous foreclosure sale. See *Isaacs* v. *Hobbs Tie & Timber Co.*, *supra*; *Lincoln-Alliance Bank & Trust Co.* v. *Dye*, 2 Cir., 108 F. 2d 38; *In re Franklin Garden Apartments, Inc.*, 2 Cir., 124 F. 2d 451; *In re White Plains Ice Service, Inc.*, 2 Cir., 109 F. 2d 913.

Moreover, it is confusing and unreal to regard a state receivership as essentially the mortgagee's remedy designed as a kind of substitute for the immediate or piepowder relief to which a mortgagee should be entitled. For under modern law the mortgagee is far from entitled to immediate relief; and the receiver is an officer of court with duties to others than merely the secured creditor alone. This case is striking proof of that fact. Here a purchaser of a junior lien eventually paid off the mortgage, and hence the receiver, as it turned out, should have been working for the substantial interests of the bankruptcy creditors, though the bankruptcy court is now held to have no control over his disbursements, and powerless to prevent him from paying himself and his attorney very well and leaving only a deficit for the estate.

I have discussed §2a(21) at this length partly because the majority opinion chiefly relies upon it, and partly because an understanding of its philosophy aids in a correct [fol. 39] conception of §69d. But so far as this case is concerned §69d is controlling, for it covers the case of acts by a state receiver after the bankruptcy petition is filed and here every collection of the receiver was after bankruptcy. It reads: "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act, of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition." And he must file a schedule setting forth a summary "of the property in his charge" and of the liabilities of the estate, and a sworn statement of his administration, and he "shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

Section 69d was another completely new section of the Act, and my observations above apply with even greater force here. In fact, even on the assumption that §2a(21) covers only property subject to the exclusive jurisdiction of the bankruptcy court and that mortgaged property is excluded, I do not see how §69d can be ignored. It speaks of a receiver "of *any of* the property of a bankrupt"; it covers action subsequent to the filing of a petition in bankruptcy; it does not deprive a state court of jurisdiction.

All it does is effectively protect the bankruptcy court's interest in property administered in other proceedings.

The fact that the House Committee in its report said that this provision was designed to make it possible for "equity receivers" to know how to proceed with further administration between filing of an involuntary petition and adjudication certainly does not state an express or clear limitation. Its purpose applies just as much to a receiver of "any of [fol. 40] the property of a bankrupt" as to a receiver liquidating a corporate estate.[8]

Since, as stated, every move made by the receiver in the case before us followed the filing of the petition, §69d must apply, no matter what limitations we may wish to read into §2a(21). Under §2a(21), the bankruptcy court has power to order a turnover, which it presumably might not do in some instances. But §69d is apparently mandatory. By the terms of the provision, all of the rents collected here were without authorization. Presumably the bankruptcy court could deny the receiver any compensation for having proceeded without first submitting to the court's jurisdiction. At any rate, as I view it, he is clearly subject to the supervision of the bankruptcy court. True, his accounts were actually passed upon by the state court, but this was long after bankruptcy and really by sufferance or delay of the bankruptcy court.

I cannot see that it is any answer to say that this exertion of federal power would be "galling" to state courts. Any exertion of federal power is "galling" to a state if one

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[8] Accurately considered, of course, the words "equity receivers" adequately describe any of the various receiverships in New York, note 6, *supra*. Even if the Committee had in mind the more limited corporate receiverships, it should be noted that it was affirming a general proposition of applicability, not *negating* other unmentioned things. This is made even clearer by the briefer statement in the Senate Committee Report, Sen. Rep. No. 1916, 75th Cong., 3d Sess., 1938, 18; and see also its more inclusive definition of the coverage of §2a(21) cited above, *Ibid.* 12. The House Report also said of this that it gave to bankruptcy courts much needed power over the administration of equity receiverships, assignments for the benefit of creditors, "and the like." H. R. Rep. No. 1405, 75th Cong., 1st Sess., 1937, 20.

wishes to be epithetical. If one starts with the epithet, Congress is confronted at once with a presumption against it which can be dispelled only by the most explicit language. When it is remembered that the federal power over bank-[fol. 41] ruptcy legislation is an enumerated power of the Constitution, it is unseemly to insist on indulging the feelings of state courts. *Cf. Prudence Realization Corp.* v. *Geist*, —— U. S. ——, 62 S. Ct. 978; and see 49 Yale L. J. 1090 for a discussion of the cases holding state insolvency acts suspended *ipso facto* by the Bankruptcy Act. Experience has taught us the necessity of one uniform national system of bankruptcy; it is too late to save state pride here—if, indeed, it is actually engaged—by minor and irritating limitations upon the full relief which should lie in the hands of the bankruptcy courts.

[fols. 42,43] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of

JOHN M. RUSSELL, INC., Bankrupt,

ALLAN D. EMIL, Trustee, etc., Appellant,

JUDGMENT—Filed August 31, 1942

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 4, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,052, U. S. Circuit Court of Appeals, Second Circuit. Term No. 551. Allan D. Emil, as Trustee in Bankruptcy of John M. Russell, Inc., Petitioner, vs. Harry Hanley, Receiver. Petition for a writ of certiorari and exhibit thereto. Filed November 27, 1942. Term No. 551 O. T. 1942.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 551

In the Matter

of

JOHN M. RUSSELL, INC.,

Bankrupt.

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc.,

Appellant,

HARRY HANLEY, Receiver,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

DAVID HAAR,
Attorney for Petitioner.

THE COURT PRESS, N. Y. C.



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HARRY HANLEY, Receiver,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Allan D. Emil, as Trustee in bankruptcy of the above-named John M. Russell, Inc., bankrupt, respectfully submits this petition for a writ of certiorari for the purpose of reviewing a decision and order of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled proceeding.

The decision was by a divided Court. It affirmed an order of the United States District Court for the

Eastern District of New York, denying your petitioner's application for an order requiring the respondent, Harry Hanley, as Receiver, to file his accounts with the Bankruptcy Court, in which the estate of John M. Russell, Inc., bankrupt, was being administered. The application for such order was made directly under the provisions of the Bankruptcy Act, as amended in 1938, and commonly known as the Chandler Act. The specific sections of the Bankruptcy Act pursuant to which your petitioner felt himself entitled to the relief which he sought and which has now been denied, are Sections 2a, subd. 21, and 69d, 11 U. S. C. A., sect. 11a, subd. 21, and sect. 109(d). These sections are set forth herein at p. 9.

The Court below, in affirming the order, relied upon the opinion of Hon. Learned Hand (R., p. 25). Hon. Charles E. Clark dissented in a written opinion (R., p. 30).

Jurisdiction.

The order of affirmance was entered in the Circuit Court of Appeals on August 31, 1942 (Clerk's Certified Order). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347a).

The Issues of Law Involved.

There is a clear line of demarcation as to interpretation of the Statute between the majority and the dissenting opinions. The issue is clarified by the reasons presented in the two opinions for the respective interpretations of the Statute, pursuant to

which your petitioner believes himself entitled to the order prayed for, and which has so far been denied."

It should be noted that even in the majority opinion, the Court said "we are not sure what Congress meant by the added phrase 'agents authorized to take possession of, or liquidate a person's property'" (R., p. 29). On the other hand, the dissenting opinion expresses a firm conviction that the Receiver here was "subject to the supervision of the Bankruptcy Act as to his allowances and disbursements". Judge Clark points out "that the opinion concedes doubt as to what this means (referring to the foregoing quoted excerpt from Section 2a, subd. 21), but is content again to rely on General Bankruptcy Rules apart from the sections itself" (R., p. 36).

The important issues, therefore, may be stated as follows:

1. Was the majority of the Court justified in its interpretation of the applicable sections of the Bankruptcy Act so as to affirm an order which denied the trustee's right to compel an accounting of a State Court mortgage foreclosure receiver, with respect to rents collected by him and moneys disbursed by him, when all of those moneys were collected after the filing of the petition in bankruptcy against the bankrupt, of which the petitioner is the trustee?

2. Does the phrase "receivers or trustees appointed in proceedings not under this Act" and the phrase "agents authorized to take possession of, or to liquidate a person's property" used in Section 2a, Subd. 21 of the Bankruptcy Act, exclude a receiver in a mortgage foreclosure suit

begun in the State Court prior to the filing of the petition, when the evidence is clear that this receiver collected rents of the real estate belonging to the bankrupt after the date of the filing of the petition?

3. Does the phrase "a receiver or trustee not appointed under this Act of any of the property of the bankrupt shall be accountable to the Bankruptcy Court in which the proceeding under this Act is pending * * *" used in sect. 69d of the Bankruptcy Act, exclude a receiver in a mortgage foreclosure suit where the receiver was appointed prior to the filing of the petition, but collected rents after the filing of the petition, and which rents, so collected, are sought to be made the subject of an order for an accounting in the Bankruptcy Court?

As stated, the majority opinion in the Circuit Court of Appeals held to the interpretation excluding the right to an accounting from such a receiver. The dissenting opinion held to the contrary.

Statement of Facts.

On August 31st, 1940, John M. Russell, Inc. was petitioned into involuntary bankruptcy in the Eastern District of New York (R., p. 5). On the date when the petition was filed, the bankrupt was the owner of an apartment house, completed about two or three months before that date, and which apartment house was located in Great Neck, Long Island (R., p. 3).

On the date when the petition was filed, there was pending a suit in foreclosure against the bankrupt on behalf of a third mortgagee who held a mortgage of

$16,000 on the property, which was then past due (R., p. 3). That foreclosure suit was commenced on or about August 13, 1940 (R., p. 7). On August 17th, 1940, a Judge of the Supreme Court of the State of New York made an order appointing the respondent herein, Harry Hanley, "as receiver of the rents and profits" of the apartment house, pending foreclosure (R., p. 7).

A year later, to-wit, on August 14, 1941, the judgment in foreclosure was transferred by the plaintiff in that suit, by assignment to some unknown parties, and the sale under the judgment of foreclosure was abandoned (R., p. 4).

A motion was made by the respondent, Mr. Hanley, as receiver, to settle his accounts in the State Court, but that motion was withdrawn as premature (R., p. 4). The attention of Mr. Hanley's attorney was called to the provisions of the Bankruptcy Act requiring the Receiver to account in the Bankruptcy Court, and requesting the receiver to file such an accounting with the Referee in charge of the proceedings (R., p. 4). In spite of such request, the receiver proceeded in the State Court with his accounting (R., p. 4).

The attention of the Supreme Court was called to the fact that the then owner of the property was in control of the judgment, and that in all likelihood he would do nothing to bring on a sale of the property pursuant to the judgment (R., p. 5).

The receiver's accounting of his receipts and disbursements as presented in the Supreme Court, shows that he was appointed on August 17, 1940, but that he did not take possession of any moneys, to-wit, he did not collect any rents from the property until after September 1st, 1940. That is just one day after the petition in bankruptcy was filed (R., p. 5).

The foreclosure suit in question begun in August, 1940, proceeded to judgment in the name of the then plaintiff, Frederick Russell, on June 13th, 1941 (R., pp. 8, 9). The premises were advertised for sale for August 6, 1941. The sale was adjourned to August 14, 1941, but before that day, and on August 13, 1941, the judgment was paid and satisfied and the action was terminated, except for the accounting of Harry Hanley, the Receiver, the respondent in this matter (R., p. 9).

During Mr. Hanley's receivership, he collected rents aggregating $30,533.05, out of which he disbursed $25,668.28, leaving a balance of $4864.99 (R., p. 9). This balance is subject to his claim for commissions in the sum of $1526.65 and the claim of his counsel for services in the sum of $1000 (R., p. 9).

Other facts which are relevant are these:

The motion of your petitioner as trustee was dated August 15, 1941, and returnable on August 22d, 1941, in the United States District Court for the Eastern District of New York (R., p. 2). The notice of motion states that its object was to obtain an order requiring Mr. Hanley "to file his accounting of receipts and disbursements with the Referee in charge of these proceedings and be subject to all the rights and obligations with respect to such accounting as if he were a receiver of this Court" (R., p. 2).

Although the motion was argued on August 22d, 1941, it had not yet been decided in January of 1942. In that month, the Court before which the motion had been argued, requested counsel to submit affidavits as to what occurred in the State Court accounting proceedings.

Thereupon your petitioner's attorney, Mr. David Haar, submitted an affidavit verified on January 6, 1942, in which he respectfully protested against the receipt of any further affidavits. However, he did state the facts with regard to the accounting. He repeated the important fact that the rents collected by Mr. Hanley as receiver were collected beginning with September 1st, 1940, "which is a date subsequent to the date of the filing of the petition against the bankrupt" (R., pp. 11, 12).

It also appears that your petitioner's attorney protested in the State Court against proceeding there with respect to the accounting and insisted that the matter should be heard in the Bankruptcy Court "because the receiver was accounting for property and moneys belonging to the Bankruptcy Court" (R., p. 12).

Mr. Haar pointed out items in detail which indicated quite clearly that the accounting was not correct, and that your petitioner as trustee not only was entitled to an accounting under the law, but that he was entitled to a surcharge of Mr. Hanley as receiver, with considerable sums of money disbursed by him unlawfully, and rents not collected by him in accordance with his duties (R., pp. 13, 14).

The District Court denied your petitioner's motion with an opinion (R., pp. 18, 19) in which he expresses a doubt as to whether Section 69d of the Bankruptcy Act affects a receiver appointed in a state Court "for the sole purpose of collecting rents from a specific parcel of land owned by the Bankrupt" (R., p. 19).

However, he expressed the opinion that the Supreme Court having appointed the receiver before the bankruptcy, had prior jurisdiction in the matter irrespective of the new sections which required receivers, who handled moneys or property belonging to the estate

after bankruptcy, to account to the Bankruptcy Court for the disposition of their trust (R., p. 19).

Reasons Relied On for the Allowance of the Writ.

1. *The decision of the* Second Circuit Court of Appeals (sought to be reviewed) is in conflict with the decisions of other Federal Courts on the same subject matter.

(Argument on this point will be found herein at p. 11.)

2. The decision affects an important recent amendment of the Bankruptcy Act (relating to non-bankruptcy receivers who take possession of and manage a bankrupt's property after bankruptcy), which has not been, but should be, settled by this Court.

(Argument on this point will be found herein at p. 15.)

3. The Court below has decided a federal question, to-wit, a question arising under the Bankruptcy Act, in a way that seems to conflict with prior decisions of this Court applicable to the subject-matter in controversy.

(Argument on this point will be found herein at p. 18.)

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

ALLAN D. EMIL,
As Trustee in Bankruptcy of John M. Russell, Inc., Bankrupt,
Petitioner.

Portions of the Bankruptcy Act to Which the Decision Applies.

The applicable statutes are new. They were included as innovations in the Chandler Act, which brought about many drastic and radical changes in bankruptcy administration. The following are the two sections upon which the petitioner relied for relief.

Sect. 2a, Subd. 21 of the Bankruptcy Act (U. S. C. A., Title 11, Ch. 2, Sect. 11) speaks of the jurisdiction of courts of Bankruptcy. Among other enumerated powers, they are empowered to

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act, * * *, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for serv-

ices and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Closely related to this exercise of power is the provision added to Sect. 69, known as Sect. 69d:

"Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act, of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilties of the estate, both as of the time of and since his appointment, and a sworn statement of his administration of the estate. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

BRIEF IN SUPPORT OF PETITION.

POINT I.

The decision sought to be reviewed creates a conflict in the interpretation of the law involved between the Second Circuit and the Seventh Circuit. It is also in conflict with a decision of a District Court in the Third Circuit.

Matter of Park Beach Hotel Bldg. Corp. (7th Cir.), 96 Fed. (2) 886 (cert. denied *sub. nom. Pancoe* v. *Southman*, 305 U. S. 638;
In re Rosenberg, 128 Fed. (2) 924 (7th Cir);
Matter of Central Forging Co. (D. C. Pa.), 31 Fed. Supp. 1020.

Aside from the dissenting views expressed by Circuit Judge Clark (R., pp. 30-41) as to the application of Section 2a (21) and 69d of the Bankruptcy Act to the facts in this case, the Court should consider the decision in the Seventh Circuit on the subject.

In the case of *Matter of Park Beach Hotel Building Corp.*, 7 Cir., 96 Fed. (2) 886, a similar question arose within the year before September, 1938, the effective date of the Chandler Act. In that case too there was a foreclosure of a mortgage on an apartment house, owned by the debtor. As in our case, a receiver had been appointed to collect the rents pending foreclosure. The action to foreclose was still pending, when the owner of the property filed a petition for reorganization under the Bankruptcy Act.

Upon the filing of this petition, the foreclosure receiver surrendered possession of the property to the trustee. However, the receiver filed his report and accounting in the State Court, which had appointed him. That court approved the accounts, and awarded him an allowance for additional services. It also ordered compensation to his attorney out of the fund.

In the Bankruptcy Court, a protest was lodged by the trustee against the account, and demand was made that the receiver return to the estate the moneys which he had paid to himself and to his attorney.

The receiver contended (as the receiver did in this case) that the Bankruptcy Court was without jurisdiction to undo what the State Court had already done with respect to the allowance of compensation to him and to his attorney.

The Seventh Circuit Court overruled the contention, in the following language:

> "Upon adjudication, all property of the bankrupt vests in the trustee as of the date of the filing of the petition. The bankruptcy jurisdiction and the Court's possession and control of the estate in pursuance of the same, are paramount and exclusive and cannot be affected by proceedings in other courts, whether state or federal. *Taylor* v. *Sternberg*, 293 U. S. 470, 27 A. B. R. (N. S.) 1, 55 S. Ct. 260, 79 L. Ed. 599; *Gross* v. *Irving Trust Company*, 289 U. S. 342, 22 A. B. R. 1215. It follows that a receiver of the bankrupt's property in a prior pending proceeding is subject to this paramount authority, for the result of bankruptcy is binding upon both the court appointing the receiver and the receiver as custodian of that court. With the filing of

the petition for reorganization under the bankruptcy law and its approval the power of the state court ceased and the order fixing compensation of the receiver and his counsel entered thereafter was a nullity. *Taylor* v. *Sternberg, supra.*

From the moment the jurisdiction of the federal court attached, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court, and, therefore, not adversely. The receiver, having erroneously deducted compensation after the attachment of such jurisdiction, was in no sense an adverse claimant. His claim was colorable only and subject to the summary power of the bankruptcy court, which had the power to require him to file an account, the correctness of which is of necessity subject to the summary jurisdiction of the bankruptcy court. *Taylor* v. *Sternberg, supra.*"

Matter of Park Beach Hotel Bldg. Corp., 96 Fed. (2d) 886 (7th Cir.).

That case was decidedly weaker in its facts than ours. There, all the money had been collected out of the debtor's property by the receiver *before* bankruptcy. In our case all the money was collected out of the bankrupt's property *after* bankruptcy. In both cases however, the accounting was filed in the State Court after bankruptcy. Also, in both cases, it was the State Court that passed on the accounts of the receiver and gave him and his attorney compensation.

There the similarity stops. In the Seventh Circuit, the Court held the action of the State Court in fixing allowances *after* the Bankruptcy Court acquired jurisdiction to be a nullity, citing *Taylor* v.

Sternberg, 293 U. S. 470 and *Gross* v. *Irving Trust Co.*, 289 U. S. 342. In the decision now sought to be reviewed, the Second Circuit, in a majority opinion, held on similar facts that such action by the State Court and *with respect to moneys collected after bankruptcy*, was not a nullity.

It should be apparent that had the *Park Beach Hotel Building Corp.* case been presented to the Second Circuit, that that court would have decided the case differently than the Seventh Circuit did. The contrary is also true.

The Seventh Circuit followed this principle of interpretation of the new section 2a(21) in *In re Rosenberg* (May, 1942), 128 F. (2) 924. It required an "agent" in possession of real estate to account in the Bankruptcy Court under this section.

We therefore respectfully point to this conflict of decision between different circuits as justifying the granting of the Trustee's petition for a writ.

Perhaps we should call the Court's attention to another case of conflict. We refer to the case of *Matter of Central Forging Co.*, 31 Fed. Sup. 1020, a case in the District Court of Pennsylvania. There, too, a receiver had been appointed in a State Court before proceedings were begun for reorganization. The question came up as to whether that receiver was required to file his accounting in the Bankruptcy Court. The District Court of Pennsylvania said this:

> "The first question is whether a receiver appointed by a state court prior to commencement of reorganization proceedings must, as to acts done subsequent to the filing date of the reorganization petition, file his account in the state court or in the federal court.

Whatever the law was formerly, it is now settled by the amendatory Chandler Act of 1938 that as to acts done after the filing of the reorganization petition, the receiver must primarily account to the federal court rather than to the state court of his appointment."

Matter of Central Forging Co., Debtor, 31 Fed. Supp. 1020.

We believe it essential to uniformity of decision on so important a provision of our Bankruptcy Law, added in 1938, that this conflict of views between different circuits be eliminated by a decisive opinion of this Court. For that reason we respectfully submit that the petition should be granted and the writ issued.

POINT II.

Since uniformity and certainty of interpretation of Federal Statute Law is desirable, this petition for a writ should be granted, so as to settle the meaning of the terms "non-bankruptcy receivers, trustees and agents", in Sec. 2a (21), and Sec. 69 (d) of the Bankruptcy Act.

The prevailing opinion seems to base the decision on the dissimilarity between a "mortgage foreclosure receiver" and an "equity receiver" (R., p. 27). "Thus, the only question is whether the sections added in 1938 assimilated the two receiverships" (R., p. 27). The majority holds that "There is every antecedent reason to say that they did not" (R., p. 27). But the opinion goes on further to say:

"We are not sure what Congress meant by the

> added phrase: 'agents authorized to take possession of or liquidate a person's property' " (R., p. 29).

The dissenting opinion of Judge Clark expresses no doubt at all about the intent of Congress in enacting the new legislation. He says:

> "I think that under the express provision of the Chandler Act, now appearing as Bankruptcy Act, Sects. 2a (21), 69d, 11 U. S. C. A., Sects. 11a (21), 109d, as well as by virtue of its policy and purpose, this receiver is subject to the supervision of the bankruptcy court as to his allowances and disbursements" (R., p. 30).

Judge Clark goes to the heart of the matter when he refers to the fundamental principles of bankruptcy administration which were involved in the appeal. He says:

> "The whole purpose of bankruptcy is orderly, equitable distribution of a debtor's property. In ordinary bankruptcy, to be sure, Congress has left secured property outside the distribution hierarchy. *But we might by no means infer from this that assets must be eaten up by exorbitant charges for administering secured assets outside the bankruptcy court*" (R., p. 37).

If the decision were to remain as it is, resting solely on a doubtful distinction between one kind of receiver and another, and disregarding the important fact as to the origin and ownership of the *res* held by each, there will be such uncertainty of interpretation as to bring about confusion, rather than orderliness in bankruptcy administration. Judge Clark's prophecy of endless litigation "before we ever know who

is a receiver and who is not, under Sect. 2a (21)" (R., p. 35) will prove to be more than a premonition of dire consequences to follow. What Congress meant to do, in our opinion, was to strengthen the hand of the bankruptcy court as it reaches out to gather in a bankrupt's assets—no matter in whose possession, no matter what you call him. He who has possession of a bankrupt's property *especially if he acquired it after bankruptcy intervenes,* must turn it over, or account for every penny of it, to the bankruptcy court—whether the man who has possession of it be called receiver in foreclosure, receiver in equity, receiver in supplementary proceedings, assignee, trustee, custodial agent, liquidating agent, or by such other name as the fertile mind can conjure up.

It seems to us that the intent of Congress has been thwarted by the decision which we seek to review. The dissenting opinion, and the decisions in other circuits on the same subject, create a doubt as to the real intent of Congress in enacting these amendments in 1938.

Under these circumstances, there is presented here an important question of federal statute law that should be settled decisively by this Court. For that reason, too, we respectfully submit, the petition should be granted and the writ issued.

POINT III.

The decision of the Court below, affecting as it does the operation of a Federal Law, is in conflict with prior decisions of this Court relating to the same subject matter.

Gross v. *Irving Trust Co.*, 289 U. S. 342;
Lion Bonding v. *Karatz*, 262 U. S. 640;
Taylor v. *Sternberg*, 293 U. S. 470.

We believe that there can be no dispute of Judge Clark's statement in his dissenting opinion that "The whole purpose of bankruptcy is orderly, equitable distribution of a debtor's property" (R., p. 37). It certainly is one important purpose, the other one being the discharge of the bankrupt from his debts.

This Court has held repeatedly that the bankruptcy court's jurisdiction over a bankrupt's property is paramount (*Taylor* v. *Sternberg*, 293 U. S. 470). It is so far exclusive for administration purposes that the bankruptcy court is powerless to surrender its control in that regard (*U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205; *Isaacs* v. *Hobbs*, 283 U. S. 734).

That paramount and exclusive power of administration over bankrupt's property was recognized before the Chandler Act was passed in 1938. Judge Clark gives instances in his dissent (R., pp. 32-34). Equity receivers, of course, must yield to this paramount power (*Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640).

In the case of *Gross* v. *Irving Trust Co., supra*, this Court said:

"The jurisdiction of the bankruptcy court be-

> ing paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court."

In the case of *Lion Bonding Co.* v. *Karatz, supra,* this Court said:

> "Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court."

We believe that the basic principle underlying the proper decision in this case will be found in *Taylor* v. *Sternberg, supra.* While it is true that there a receiver was appointed by a Chancery Court, and he was not a mortgage foreclosure receiver, nevertheless the decision did not turn on distinctions between one kind of receiver and another. This Court's decision in that case rested firmly upon principles of bankruptcy administration, to-wit: that primarily the Bankruptcy Court deals with the bankrupt's property, no matter in whose possession it may be found.

We quote from the decision:

> "Upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of the filing of the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. *Gross* v. *Irving Trust*

Co., 289 U. S. 342, 22 Am. B. R. (N. S.) 661, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A. L. R. 1215; *Acme Harvester Co. v. Beekman Lum. Co.*, 222 U. S. 300, 27 Am. B. R. 262, 32 S. Ct. 96, 56 L. Ed. 208; *In re Diamond's Estate* (C. C. A., 6th Cir.), 44 Am. B. R. 268, 259 F. 70. This applies while the possession is constructive as well as when it becomes actual. *Mueller* v. *Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 S. Ct. 269, 46 L. Ed. 405; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 2 Am. B. R. (N. S.) 912, 44 S. Ct. 396, 68 L. Ed. 770; *Orinoco Iron Co.* v. *Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 F. 40, and cases cited."

In our case Hanley, the receiver, had collected over $30,000 of rents growing out of leases upon the bankrupt's apartment house. Every dollar of that $30,000 came into Hanley's possession after August 31, 1940, the date when the petition in bankruptcy was filed.

When the petitioner was appointed trustee of the bankrupt's assets, his title to this apartment house became vested as of August 31st, 1940, under Section 70 of the Bankruptcy Act. Moreover, by the amendment of 1938, the trustee's title became even more clearly defined in relation to the possession of a receiver. The very last sentence in Section 70 reads:

> "The title of the trustee shall not be affected by the prior possession of a receiver or other officer of *any* Court."

Thus the hands of the Bankruptcy Court had been strengthened in every conceivable way by the Chandler Act for the purpose of administering assets of the bankrupt, no matter in whose possession they may be found.

This Court, even before the Chandler Act was enacted, has held repeatedly that that principle of bankruptcy administration must be observed under the Statute, and that it is not a matter of one kind of a receiver or another kind of a receiver. If a person, call him what you will, *has possession of property belonging to a bankrupt*, and particularly, if he takes possession of it after bankruptcy, that person must account to the Bankruptcy Court, and to no other.

Insofar as the decision of a majority turns on the distinction between one kind of a receiver and another in its interpretation of Section 2, subd. 21, and Section 69d of the Bankruptcy Act, we respectfully submit that the Court below failed to take cognizance of this Court's ruling that what a Bankruptcy Court is concerned with is the *res*, and not with the persons who handle it. The rulings of this Court, we respectfully submit, have not been followed in the decision sought to be reviewed. For that reason, too, this Court should grant the writ prayed for.

Conclusion.

For the three reasons indicated in the petition, as elaborated in our argument, we respectfully submit that the petitioner is entitled to the granting of his petition, and that a writ of certiorari should be issued to the Circuit Court of Appeals for the Second Circuit, so that this Court may review the decision, and render such other decision in the case as the facts and the law justify.

Respectfully submitted,

DAVID HAAR,
Attorney for Petitioner.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 551.

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc.,

Appellant,

vs.

HARRY HANLEY, Receiver,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF.

DAVID HAAR,
Attorney for Appellant.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 551.

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc.,

Appellant,

vs.

HARRY HANLEY, Receiver,

Appellee.

APPELLANT'S BRIEF.

Statement.

This appeal brings up for review a decision of the Circuit Court of Appeals for the Second Circuit (130 F. (2d) 369), and the order entered thereon (R. 31). That decision (by a divided Court) affirmed an order of the District Court for the Eastern District of New York (R. 15), which denied the appellant's petition to compel Mr. Hanley, the respondent, to account in the Bankruptcy Court for all moneys received by him as Receiver of the bankrupt's real estate. The appellant's application for the order was based on the newly created obligations of a non-bankruptcy receiver, found in Section 2a(21) and 69d of the Bankruptcy Act, as amended in September 1938 (11 U. S. C. A., Sec. 11a(21) and Sec. 109d). The moneys to be accounted for were the proceeds of rent collections made by the respondent after the filing of the petition in bankruptcy against John M. Russell, Inc., the bankrupt and owner of the property.

The majority of the Court, in an opinion by Circuit Judge Learned Hand, held the new sections inapplicable

to mortgage foreclosure receiverships (R. 17). Judge Clark, dissenting, held that under the express provisions of these sections, as well as by virtue of the "policy and purpose" of the Bankruptcy Act, the respondent, as receiver, was subject to the supervision of the Bankruptcy Act (R. 22).

Jurisdiction.

This Court's jurisdiction to entertain this appeal is based on an order entered herein on January 4, 1943, granting the appellant's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (R. 32).

Statement of the Case.

On August 31, 1940, John M. Russell, Inc. was petitioned into involuntary bankruptcy in the Eastern District of New York (R. 4). When the petition was filed, the bankrupt was the owner of an apartment house, completed about two or three months before that date, and which apartment house was located in Great Neck, Long Island (R. 2).

On the day when the petition was filed, there was pending a suit in foreclosure against the bankrupt on behalf of a third mortgagee who held a mortgage of $16,000 on the property, which was then past due (R. 3). That foreclosure suit was commenced on or about August 13, 1940 (R. 6). On August 17th, 1940, a Judge of the Supreme Court of the State of New York made an order appointing the respondent herein, Harry Hanley, "as receiver of the rents and profits" of the apartment house, pending foreclosure (R. 6).

A year later, to-wit, on August 14, 1941, the judgment in foreclosure entered on June 13, 1941, was "paid and

satisfied" (R. 7). The sale under the judgment of foreclosure was abandoned (R. 3).

A motion was made by the respondent, Mr. Hanley, as receiver, to settle his accounts in the State Court (R. 3). The attention of Mr. Hanley's attorney was called to the provisions of the Bankruptcy Act requiring the Receiver to account in the Bankruptcy Court, and requesting the receiver to file such an accounting with the Referee in charge of the proceedings (R. 3). In spite of such request, the receiver proceeded in the State Court with his accounting (R. 4).

The attention of the Supreme Court was called to the fact that the then owner of the property was in control of the judgment, and that in all likelihood he would do nothing to bring on a sale of the property pursuant to the judgment (R. 4).

The receiver's accounting of his receipts and disbursements as presented in the Supreme Court, shows that altho he was appointed on August 17, 1940, he did not collect any rents from the property until after September 1st, 1940. That is just one day after the petition in bankruptcy was filed (R. 4).

Upon the payment and satisfaction of the judgment of the mortgagee, the action was terminated (R. 7). However, the Receiver in the action, Mr. Hanley, still had to file his accounting (R. 7).

During Mr. Hanley's receivership, he collected rents aggregating $30,533.05, out of which he disbursed $25,668.28, leaving a balance of $4864.99 (R. 7). This balance is subject to his claim for commissions in the sum of $1526.65 and the claim of his counsel for services in the sum of $1000 (R. 7).

Although the motion was argued on August 22d, 1941, it had not yet been decided in January of 1942. In that month, the Court before which the motion had been

argued, requested counsel to submit affidavits as to what occurred in the State Court accounting proceedings.

Thereupon an affidavit was submitted by Mr. Haar, appellant's attorney, verified on January 6, 1942, in which he respectfully protested against the receipt of any further affidavits (R. 9). However, he did state the facts with regard to the accounting. He repeated the important fact that the rents collected by Mr. Hanley as receiver were collected beginning with September 1st, 1940, "which is a date subsequent to the date of the filing of the petition against the bankrupt" (R. 9).

It also appears that the appellant's attorney protested in the State Court against proceeding there with respect to the accounting, and insisted that the matter should be heard in the Bankruptcy Court "because the receiver was accounting for property and moneys belonging to the Bankruptcy Court" (R. 9).

Mr. Haar pointed out items in detail which indicated quite clearly that the accounting was not correct, and that the trustee was not only entitled to an accounting under the law, but that he was entitled to a surcharge against Mr. Hanley as receiver, for considerable sums of money disbursed by him unlawfully, and rents not collected by him in accordance with his duties (R. 10).

The District Judge denied the motion. In his opinion (R. 14), he expresses a doubt as to whether Section 69d of the Bankruptcy Act affects a receiver appointed in a state Court "for the sole purpose of collecting rents from a specific parcel of land owned by the Bankrupt" (R. 15).

He also stated that, since the Supreme Court had appointed the receiver before the bankruptcy, it had prior jurisdiction in the matter irrespective of the new sections of the Bankruptcy Act which required receivers.

who handled moneys or property belonging to the estate *after* bankruptcy, to account to the Bankruptcy Court for the disposition of their trust (R. 15).

Assignments of Errors.

The two errors which appellant urges here are:

1. The ruling of the majority of the Circuit Court of Appeals that sections 2a(21) and 69(d) of the Bankruptcy Act (11 U. S. C. A. Sec. 11a(21), 109d) cast no obligation upon Mr. Hanley, as receiver in a mortgage foreclosure suit, to account in the Bankruptcy Court for moneys received and disbursed by him after August 31, 1940, when the petition in bankruptcy was filed.

2. The ruling that Mr. Hanley, as such Receiver, was not obligated to account in the Bankruptcy Court for these receipts and disbursements, irrespective of Statute, since these moneys came into his possession after bankruptcy, and were the proceeds of property to which the trustee had title as of August 31, 1940.

Portions of the Bankruptcy Act Applicable to This Appeal.

The applicable statutes are new. They were included as innovations in the Chandler Act, which brought about many radical changes in bankruptcy administration. The following are the two sections upon which the appellant based his right to the order which has been denied.

Sec. 2a, subd. 21 of the Bankruptcy Act (U. S. C. A., Title 11, Ch. 2, Sec. 11) speaks of the jurisdiction of

courts of Bankruptcy. Among other enumerated powers, they are empowered to

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act; * * *, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Closely related to this exercise of power is the provision added to Section 69, known as Section 69d (11 U. S. C. A. Sec. 109d):

> "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act,

of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of and since his appointment, and a sworn statement of his administration of the estate. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

The last sentence of Section 70 (11 U. S. C. A. Sec. 110) is also new and important:

"* * * The title of the trustee shall not be affected by the prior possession of a Receiver or other officer of any Court."

Argument.

In presenting this argument on the part of the appellant, we respectfully call the Court's attention to the following important facts about which there can be no dispute:

1. John M. Russell, Inc., the bankrupt, was petitioned into bankruptcy on August 31, 1940.

2. On that day, the respondent, Mr. Hanley, was acting as a receiver in a mortgage foreclosure suit, having been appointed in the State Court on August 17, 1940.

3. His duties were to collect the "rents and profits" of the apartment house owned by the bankrupt (R. 6).

4. The only "rents and profits" collected by Mr. Hanley, were those which accrued after September 1, 1940, one day after the petition was filed (R. 4).

5. The total collected by the Receiver was $30,533.05. The total expended was $25,668.28, leaving a balance in his hands of $4864.77 (R. 7).

6. The mortgagee, on whose behalf the foreclosure suit was brought, entered a judgment in the action, which judgment was "paid and satisfied" (R. 7) on August 13, 1941.

7. The Receiver, Mr. Hanley, was still required to account for his receipts and disbursements, after this payment of the judgment (R. 7).

The controversy below centered around the question as to whether the Respondent was required to account in the Bankruptcy Court under the amendment of the Chandler Act relating to non-bankruptcy Receivers, or whether his accounting in the State Court was sufficient, in spite of the fact that every dollar of receipts and disbursements was received and disbursed after bankruptcy.

POINT I.

A receiver is a custodian of the *res* which is the subject of litigation. As such he holds possession for the owner.

Union Bank of Chicago v. *Kansas City Bank*, 136 U. S. 223, 236;

Thompson v. *Phenix Insurance Co.*, 136 U. S. 289, 297;

Keeney v. *Home Insurance Co.*, 71 N. Y. at 401; *Dow* v. *Nealis*, 47 Misc. (N. Y.) 153.

It seems to us that the majority opinion of the Circuit Court stressed too much the distinction between a receiver in a foreclosure suit, and a receiver in a state insolvency suit (R. 19). We believe that a study of the authorities, and particularly a consideration of the purpose of the amendments under discussion, will prove the distinction unnecessary, in view of the facts in the case.

In the first place, we think it is altogether too broad a statement to make, as is made in the majority opinion, that "all the rents were sequestered for the benefit of the third mortgagee" (R. 18) upon the appointment of a receiver. The case of *Sullivan* v. *Rosson*, 223 N. Y. 217, cited as the law of New York for that proposition, does not, it seems to us, go quite that far.

Indeed, the Court cited *Freedman Savings & Trust Company* v. *Shepherd*, 127 U. S. 492, for the proposition that if the income of the property is pledged as security for the debt, the mortgagor "would have been entitled to the income until at least possession was demanded under the deed; or until his possession was disturbed by a sale under the deed of trust, or in advance of the sale by having a receiver appointed for the benefit of the mortgagee" (Cited in *Sullivan* v. *Rosson*, 223 N. Y. 215, at 225.

In our case the respondent, as receiver, was collecting the rents of the mortgaged property, but it turned out that what he collected was not needed to pay the mortgage debt. He was therefore holding the proceeds of his collections for the owner, and the owner in this case was the appellant, as trustee in bankruptcy of John M. Russell, Inc., bankrupt.

The general rule of law is that a receiver, whether in foreclosure, or in proceedings supplementary to execution, or in a partnership dissolution—or even in an equity suit, is appointed by the Court to act as custodian of the *res*.

> "A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property."
>
> *Union Bank of Chicago* vs. *Kansas City Bank*: 136 U. S. 223, at 236.

In a mortgage foreclosure suit a receiver is considered to be the agent of the owner, and not of the mortgagee. This certainly would be so at least until judgment of foreclosure and sale.

> "It has been held that as to the mortgagor the Receiver is his agent for all purposes, and that such Receiver is not restricted to matters between the mortgagor and mortgagee."
>
> 42 *Corpus Juris*; Title: "Mortgages," Sec. 1705 citing *Re Hale*, 79 L. T. Rep. (N. S.) 468.

If we are to be guided by the law of New York as to the effect of a receivership (R. 18), we submit the following authority to support our view on the subject:

> "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided.

> The title to the property is not changed by the appointment. The Receiver acquires no title, but only the right of possession as the officer of the Court. The title remains in those in whom it was vested when the appointment was made."
>
> *Keeney* vs. *Home Insurance Co.*, 71 N. Y. at 401.

In view of these authorities we believe that Mr. Hanley, as receiver, being the agent of the owner (John M. Russell, Inc.) became the agent of the new owner (Allan D. Emil, the trustee) upon his appointment. It was he who had title to the property as of August 31, 1940. That title was not "affected by the prior possession" of Mr. Hanley as receiver (Bankruptcy Act, Sec. 70, last sentence).

That being so, moneys collected by Mr. Hanley, after August 31, 1940, were collected and held by him as "agent" for Mr. Emil the trustee. The State Supreme Court had no jurisdiction over Mr. Emil. But the Bankruptcy Court did have jurisdiction not only over its own trustee, but also of Mr. Hanley, the receiver, insofar as the new statute required him to account as a non-bankruptcy receiver or "agent" for moneys received by him out of the bankrupt's property after bankruptcy.

The majority opinion ruled that the statute did not apply to a receiver in a mortgage foreclosure suit. In our next point we will discuss our contention that such a receiver does come within the category of a non-bankruptcy "receiver" or "agent", and hence the order under review was erroneous.

POINT II.

The two new sections of the Bankruptcy Act make it obligatory on all non-bankruptcy receivers and agents to account in the Bankruptcy Court for moneys received by them after bankruptcy.

The sections under discussion are new. They are the result of careful planning and discussion, both by the National Bankruptcy Conference, and the Congressional committee entrusted with drafting the amendments for Congressional action. Why were the alternative terms used: "receivers", "trustees", "assignees for the benefit of creditors", "agents"? What do they mean?

Judge Learned Hand, in the majority opinion remarked:

> "We are not sure what Congress meant by the added phrase: 'agents to take possession of or liquidate a person's property'." (R. 21).

Judge Clark, however, expressed no doubt at all about the intent of Congress in enacting the new legislation. He says:

> "I think that under the express provision of the Chandler Act, now appearing as Bankruptcy Act, Sect. 2a(2), 69d, 11 U. S. C. A. Sects. 11a(21), 109d, as well as by virtue of its policy and purpose, this receiver is subject to the provision of the bankruptcy court as to his allowances and disbursements" (R. 22).

He goes to the heart of the matter when he says, with special reference to Section 69d:

> "It speaks of a receiver 'of *any* of the property of a bankrupt'; it covers action subsequent to the filing

of a petition in bankruptcy; it does not deprive a state court of jurisdiction. All it does is effectively protect the bankruptcy court's interest in property administered in other proceedings" (R. 29, 30).

That the new sections are broad enough to include such a mortgage foreclosure receiver has already been decided in at least two reported cases since the amendments went into effect.

In the *Matter of Central Forging Co.*, 31 F. Supp. 1020 (D. C. Pa.) a receiver had been appointed in a State Court before proceedings were begun for reorganization. The question arose as to whether the receiver was required to file his accounting in the Bankruptcy Court. The Court said this:

> "The first question is whether a receiver appointed by a State Court prior to commencement of reorganization proceedings must, as to acts done subsequent to the filing date of the reorganization petition, file his account in the state court or in the federal court.
>
> Whatever the law was formerly, it is now settled by the amendatory Chandler Act of 1938 that as to acts done after the filing of the reorganization petition, the receiver must primarily account to the federal court rather than to the state court of his appointment."
>
> *Matter of Central Forging Co.*, Debtor, 31 F. Supp. 1020.

In the Seventh Circuit a similar ruling was made in the case of *In re Rosenberg*, 128 F. (2) 924 (May, 1942). It required an "agent" in possession of real estate to ac-

count in the Bankruptcy Court under section 2a(21) of the Bankruptcy Act.

In the case at bar, the mortgagee, for whose protection the receivership was inaugurated, was paid in full. He had no further interest in any accounting the receiver might render. The original owner of the property had lost it—his title passed to Mr. Emil, the appellant. Certainly the original owner had no interest in the accounting. The receiver, being a mere custodian and an agent of the title-holder, the trustee, having collected money out of the *res* of which the trustee had title, was in duty bound to account to *him*—and to no one else.

With such an analysis of the situation, we believe it must be clear that the term "receiver" in the statute, means any custodian who has possession for the owner, or for the person ultimately declared to be the owner. If that is so, then the majority opinion below interprets a "receiver" within too narrow a confine. Judge Clark's view, we believe, is more consonant with reason and the legislative intent.

In our next point we will discuss our contention, that, even without the statute, the respondent should have been required to account in the bankruptcy court—particularly since all the money he had and disbursed was received by him after bankruptcy. Or, to put it in another way, the history of the development of bankruptcy administration, as shown in the decisions of many courts, indicates clearly that the intent of Congress was to make statutory a rule of law, which, up to 1938, had been followed merely because it was case-law.

POINT III.

A review of the authorities justifies the inclusion within the statute of all kinds of receivers required to account in the Bankruptcy Court for moneys received by them after bankruptcy.

With due respect to the majority opinion in this case, it is our belief that too much stress has been laid upon distinctions between one kind of receiver and another. No such distinction exists, insofar as the function of the receiver is concerned. This is especially true in bankruptcy cases. In administering bankruptcy assets we are not so much concerned with what a person is, but *what he has and to whom it belongs.* This is true because bankruptcy largely concerns itself with a *res*, and not so much with persons.

As Judge Clark said in his dissenting opinion "the whole purpose of bankruptcy is orderly equitable distribution of a debtor's property" (R. 28). That certainly is one important purpose, the other being the discharge of the bankrupt from his debts.

This Court has held repeatedly that the bankruptcy court's jurisdiction over a bankrupt's property is paramount (*Taylor* v. *Sternberg*, 293 U. S. 470). It is so far exclusive for administration purposes that the bankruptcy court is powerless to surrender its control in that regard (*U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205; *Isaacs* v. *Hobbs*, 238 U. S. 734).

With that principle in mind, may we respectfully call the Court's attention to the outstanding fact in this case, to wit, that what the respondent was called upon to account for here, was a sum of over $30,000 collected by him out of property unquestionably belonging to the Trustee in bankruptcy, as a matter of law. The apart-

ment house, whose tenants were paying rent to the receiver, was property belonging to the estate. That being so, the bankruptcy court's jurisdiction to compel an accounting for the receipt and disbursement of this $30,000 was paramount, no matter what kind of a receiver you call Mr. Hanley.

Although the statute we are discussing became effective in September 1938, the Seventh Circuit took occasion to compel an accounting as against a mortgage foreclosure receiver within a year before September 1938. We refer to the case of *Matter of Park Beach Hotel Bldg Corp.* (7th Cir.), 96 F. (2d) 886.

In that case, too, there was a foreclosure of a mortgage on an apartment house owned by the debtor corporation. As in our case, a receiver had been appointed to collect the rents pending foreclosure. The action to foreclose was still pending, when the owner of the property filed a petition for reorganization under the Bankruptcy Act.

Upon the filing of this petition, the foreclosure receiver surrendered possession of the property to the trustee. However, the receiver filed his report and accounting in the State Court, which had appointed him. That court approved the accounts, and awarded him an allowance for additional services. It also ordered compensation to his attorney out of the fund.

In the Bankruptcy Court, a protest was lodged by the trustee against the account, and demand was made that the receiver return to the estate the moneys which he had paid to himself and to his attorney.

The receiver contended (as the receiver did in this case) that the Bankruptcy Court was without jurisdiction to undo what the State Court had already done with respect to the allowance of compensation to him and to his attorney.

The Seventh Circuit Court overruled the contention in the following language:

"Upon adjudication, all property of the bankrupt vests in the trustee as of the date of the filing of the petition. The bankruptcy jurisdiction and the Court's possession and control of the estate in pursuance of the same, are paramount and exclusive and cannot be affected by proceedings in other courts, whether state or federal. *Taylor* v. *Sternberg*, 293 U. S. 470, 27 A. B. R. (N. S.) 1, 55 S. Ct. 260, 79 L. Ed. 599; *Gross* v. *Irving Trust Company*, 289 U. S. 342, 22 A. B. R. 1215. It follows that a receiver of the bankrupt's property in a prior pending proceeding is subject to this paramount authority, for the result of bankruptcy is binding upon both the court appointing the receiver and the receiver as custodian of that court. With the filing of the petition for reorganization under the bankruptcy law, and its approval, the power of the state court ceased and the order fixing compensation of the receiver and his counsel entered thereafter was a nullity. *Taylor* v. *Sternberg*, *supra*.

From the moment the jurisdiction of the federal court attached, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court, and, therefore, not adversely. The receiver, having erroneously deducted compensation after the attachment of such jurisdiction, was in no sense an adverse claimant. His claim was colorable only and subject to the summary power of the bankruptcy court, which had the power to require him to file an account, the correctness of which is of necessity subject to the summary jurisdiction of the bankruptcy court. *Taylor* v. *Sternberg*, *supra*."

Matter of Park Beach Hotel Bldg. Corp., 96 F. (2d) 886 (7th Cir.).

That case was decidedly weaker in its facts than ours. There, all the money had been collected out of the debtor's property by the receiver *before* bankruptcy. In our case all the money was collected out of the bankrupt's property *after* bankruptcy. In both cases, however, the accounting was filed in the State Court after bankruptcy. Also, in both cases, it was the State Court that passed on the accounts of the receiver and gave compensation to him and his attorney.

There the similarity stops. In the Seventh Circuit, the Court held the action of the State Court in fixing allowances *after* the Bankruptcy Court acquired jurisdiction to be a nullity. In the decision now sought to be reviewed, the Second Circuit, in a majority opinion, held on similar facts that such action by the State Court and *with respect to moneys collected after bankruptcy*, was not a nullity.

The Seventh Circuit, as we have already observed, followed this principle of interpretation after the statute was enacted in September 1938, in the case of *In re Rosenberg*, 128 F. (2d) 294. In that case an agent in possession of real estate was required to account in the bankruptcy court for moneys collected by him out of the property.

The logic of the argument followed in all of these cases, which we hope we have presented in this brief, is based upon the decision of *Taylor* v. *Sternberg*, 293 U. S. 470. There, too, the Court emphasizes that it was the *res* which was the basis for decision rather than the personality of the person holding the *res*. That opinion discussed the principles of bankruptcy administration that are now well settled. For instance:

> "Upon adjudication in bankruptcy all the property of the bankrupt vests in the trustee as of the date of

the filing of the petition. Upon such filing the jurisdiction of the bankruptcy court becomes paramount and exclusive; and therefore that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual. (Citing cases.)"

The case of *In re Diamond's Estate*, 257 F. 70 (C. C. A. 6th Cir.), has been cited so frequently, in a consideration of the particular point now at issue, that we take the liberty of quoting an applicable part of that opinion here:

"The broad question involved is whether the bankruptcy court had power, by summary order, to compel the state court receiver to turn over the money to the bankruptcy court, to await its action upon the question of compensation, fees and disbursements of that receiver. We think this question must be answered in the affirmative."

Many other cases could be cited for the exclusive and paramount jurisdiction of the bankruptcy court with respect to property of a bankrupt being held by a third party without title. (See *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205.)

Nor does the rule of comity, urged strenuously by our opponent, yield to the paramount power of the bankruptcy court, to compel an accounting with respect to moneys belonging to the bankrupt, particularly where those moneys were collected after bankruptcy. That rule of comity goes no further than to require a bankruptcy court to authorize a trustee to request the state court for leave to intervene, or to request the state court to desist from further hearings. If the state court refuses the request, that does not bar the bankruptcy court from pro-

ceeding under the statute in accordance with law. Even where the state court has taken jurisdiction, the bankruptcy court will nevertheless proceed in its own way to perform its duties under the Act.

It was so held in *Gross* v. *Irving Trust Company*, 239 U. S. 342, and, likewise, *In re Diamond's Estate*, *supra*, and a similar ruling was made in the *Matter of 188 West Randolph Street Bldg. Corp.*, 88 F. (2d) 257 (C. C. A. 7th Cir.) 1937.

All of these cases have to do with moneys collected by receivers out of the bankrupt's property *before* the filing of the petition. If such is the rule in a case of that kind, surely the need for the rule is all the greater since the amendment of 1938. The reason for that is that the moneys we are concerned with in this case were all received out of the bankrupt's property as rentals *after* the filing of the petition in bankruptcy, at which time title to the bankrupt's property was vested in Mr. Emil, the appellant.

We find here that there was a fund of at least $4,000 left after everything had been paid off, including the mortgage debt. To whom did that $4,000 belong, if it did not belong to the trustee? Why wasn't that $4,000, at least, subject to a turnover in the bankruptcy court, and an accounting had in that court for the receipts and disbursements leaving the balance claimed to be only $4,000?

Aside from these legal considerations which we have just discussed, the merits are with the appellant. We call the attention of the Court to the fact that Mr. Hanley, as receiver, got over $1,500 as his commissions, when, according to Mr. Haar's affidavit, he was considered wholly "incompetent" by the referee who heard the matter (R. 11). His attorney was awarded $1,000 for fees (R. 11).

It is quite evident, in spite of the Statute which requires notice to creditors, that the creditors' rights were not considered in making these allowances, or in passing upon the accounts. The trustee got nothing, and this in spite of the admissions by the receiver that there was some money coming to him in any event, and that Mr. Russell, an officer of the bankrupt, was permitted to stay in an apartment, the rent of which was $67.50 per month, for a period of at least six months without paying any rent at all (R. p. 10).

With all due respect to the State Court, we must express surprise at such a disposition of this matter. It may very well be that a similar disposition of other receiver's accounts in state courts, was largely instrumental in causing the National Bankruptcy Conference to add to the Statute the sections we are now concerned with, to wit, that creditors' rights are paramount in a bankruptcy case. The creditors in this case were vitally interested in this $30,000. Their rights and the receiver's obligations were to be measured by the Bankruptcy Act, not by state court rules on a receiver's accounting. That was the purpose of enacting of Section 2(a), Subdivision 21, and Section 69d of the Bankruptcy Act, constituting the amendments forming part of the Chandler Act, in September 1938.

Conclusion.

It is respectfully submitted that a proper interpretation of the sections of the Bankruptcy Act in question, required an order granting the trustee's petition to compel Mr. Hanley, the receiver, to account in the Bankruptcy Court, and to have his compensation and his attorney's fees fixed there, rather than in the State Court. Likewise, the propriety of his expenditures and failure to collect

rents, as was his duty, was also a matter for the Bankruptcy Court's consideration, and not for that of the State Court, since all of his duties were performed after the filing of the petition, and not before.

It is respectfully submitted that the order of the Circuit Court should be reversed, with a direction to reverse the order of the District Court and enter an order compelling the respondent herein to file his accounting in the Bankruptcy Court, and that the appellant should thereupon have such other relief as in the premises may seem proper.

DAVID HAAR,
Attorney for Appellant.



Supreme Court of the United States

OCTOBER TERM 1942

No. 551

IN THE MATTER

OF

JOHN M. RUSSELL, INC.,

Bankrupt.

ALLAN D. EMIL, as Trustee in Bankruptcy of
JOHN M. RUSSELL, INC.,

Appellant,

HARRY HANLEY, Receiver,

Appellee.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. McGRATH,
Attorney for Harry Hanley, as Receiver.

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Supreme Court of the United States

OCTOBER TERM 1942

No.

IN THE MATTER

OF

JOHN M. RUSSELL, INC.,

Bankrupt.

ALLAN D. EMIL, as Trustee in Bankruptcy of JOHN M. RUSSELL, INC.,

Appellant,

HARRY HANLEY, Receiver,

Appellee.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Circuit Court affirmed, by a divided court, an order of the United States District Court for the Eastern District of New York denying petitioner's application for an order requiring the respondent as receiver of the rents and profits of a parcel of real estate owned by the bankrupt, to file his account with the Bankruptcy Court. The receiver was appointed by the New York Supreme Court in an action brought to foreclose a third mortgage on the real estate.

The Facts

The opinion of Judge Learned Hand contains an accurate statement of facts which will not be here repeated.

The Issues

The record below presented the following issues for review:

1. Did the District Court err in assenting to the retention of jurisdiction by the State Court to settle the receiver's account and in acquiescing in the determination of the State Court after a full and complete hearing on the merits,

2. Do the provisions of Section 2(a)(21) and Section 69(d) of the Bankruptcy Act require that a receiver of the rents and profits, appointed by a State Court, in an action to foreclose a specific parcel of real estate owned by the bankrupt, must account in the Bankruptcy Court even though the State Court is not superseded insofar as the continuance of the foreclosure suit is concerned.

No constitutional question is involved but merely the interpretation of Section 2(a)(21) and Section 69(d) of the Bankruptcy Act.

POINT I

The order of the District Court must be sustained as an exercise of discretion.

The petitioner takes the position that, if Sections 2(a)(21) and 69(d) be construed as applicable to a receiver of the rents and profits in a state foreclosure proceeding relating to a specific parcel of real estate owned by the bankrupt, then the order of the District Court and the affirmance by the Circuit Court of Appeals are both erroneous and this petition should be granted in order that the orders may be reversed.

The case presents no such clear cut issue. We submit that even if the petitioner's construction of the statutory provisions be upheld, th order of the District Court should not be reversed. That order was not *solely* predicated upon the inapplicability of the two statutory provisions to receivers of the rents and profits. It was predicated rather upon the exercise of the discretion of the Bankruptcy Court in giving its consent and approval to the exercise of jurisdiction by the State Court and to the determination made by that court after a full hearing on the merits.

The legal interpretation of Sections 2(a)(21) and 69(d), while interesting, is academic so far as the order of the District Court is concerned. That order cannot be reversed except on a finding that the District Court abused its discretion in consenting to the exercise of jurisdiction by the State Court and acquiescing in the determination of that court.

The District Court did not immediately act on the petitioner's application to compel the receiver to account in the Bankruptcy Court. The motion was made on August 15, 1941 (fol. 46). The District Judge at the time of argument stated that he was inclined to permit the State Court to retain jurisdiction (fol. 47). The motion was decided February 10, 1942 (fol. 60). In the meantime the accounting proceeding was fully tried and determined in the State Court and an order was made settling the account on December 3, 1941 (fols. 48-49). Thereafter the District Judge asked for further affidavits (fols. 50, 34). From these affidavits he concluded: "It is evident that the issues raised by the trustee were fully tried and a determination was made on the merits" (fol. 54).

The Court then assented to the determination of the State Court in the following language (fols. 55-56):

> "Considering the two sections of the Bankruptcy Act cited by the trustee, it appears that in the event

> that this court granted the trustee's motion, the receiver's accounting would be filed and the same objections would be interposed by the trustee. This would afford him two trials of the same issues already determined in the Supreme Court of the State of New York. A fair interpretation of the Bankruptcy Act leads to the conclusion that it was not intended to give two trials of the same issues. As was said In Re National Motorship Corp. (96 Fed. (2) 88 ' ' ' ' state court's disposition was subject to assent of the Bankruptcy Court' indicating that full faith and credit can therefore be given by this court to the determination of the Supreme Court of the State of New York."

We construe the quoted language to mean that the District Court predicated its decision on the assumption that it had the power, under the statutory provisions relied on, to direct the receiver to account in the Bankruptcy Court, but withheld the exercise of that power, being satisfied that the proceedings in the State Court were proper and that the rights of those interested in the bankrupt estate had been safeguarded and protected. Under this decision the petitioner cannot be heard to complain that the court misconstrued the statute. His only ground for a reversal would be a possible abuse of discretion by the District Judge. Not only does he not make such a claim but he should certainly not be permitted to invoke the jurisdiction of this Court merely to review the exercise of such discretion.

The right of the Bankruptcy Court to consent to the exercise of jurisdiction by the State Court is well established.

> *In re National Motorship Corp.*, 96 Fed. (2) 88.
> *In re American Fidelity Corp. Ltd.*, 28 F. Supp. 462.
> *In re Canyon Pipe Line Co.*, 39 F. Supp. 233.
> *Wells* v. *California Tomato Juice, Inc.* (D. C. of Appeals, 3rd D. Cal., 1941), 118 F. (2) 916.

Even where the petition in bankruptcy antedates the foreclosure, and the jurisdiction of the Bankruptcy Court is clearly paramount (*Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734), it has become frequent practice for mortgagees of real property, upon the happening of a default, to apply to the Bankruptcy Court for leave to institute foreclosure proceedings in the State Court. Such applications are granted with great frequency, the court generally requiring a further application to be made for consent of the Bankruptcy Court to the entry of judgment of foreclosure and sale in the State Court. In this way the Bankruptcy Court does permit the exercise of jurisdiction in the courts of the state and at the same time retains sufficient control to prevent the entry of judgment if the circumstances should require that the entry of judgment be withheld.

The District Court in this case was content to limit its exercise of jurisdiction to the *supervision* of the settlement of the account by the State Court. In so doing the court was fortified by ample precedent and it cannot be said that the objectives sought to be attained by the statutory amendments were not achieved.

It is not the spirit or the policy of the bankruptcy statute or the 1938 amendments thereto to proscribe completely the exercise of any jurisdiction by a State Court. The recent decision of this Court in *Marine Harbor Properties Inc.* v. *Manufacturers Trust Company* (decided November 9, 1942) supports the view that a State Court, having acquired prior jurisdiction, should not be precluded from protecting the rights of senior creditors where it is not shown that the continued exercise of such State Court jurisdiction would prejudice other interested parties. It cannot be said on the record in this case that the District Court was not satisfied that the settlement of the receiver's accounts in the State Court did substantial justice to those interested in the bankrupt estate.

POINT II

The bankruptcy proceeding did not supersede the State Court foreclosure; in the absence of such supersession, the State Court receiver was not displaced.

Where the State Court has acquired control of property by the commencement of foreclosure proceedings prior to the filing of a petition in bankruptcy, the Bankruptcy Court will not enjoin the continuance of such proceedings.

In re Maier Brewing Co., Inc., 65 Fed. (2) 673.
Stratton v. *New*, 283 U. S. 318.

It is only where the proceedings are commenced in the State Court after the filing of the petition in bankruptcy that the Bankruptcy Court will enjoin such proceedings and assert its paramount jurisdiction.

Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734.

The following quotations from the majority opinion in the Circuit Court of Appeals are apposite:

R., p. 27:

> "Before the addition of section 2(a)(21) and section 69(d) there was therefore no doubt that the jurisdiction of the Bankruptcy Court over foreclosure receivers—including the power to pass their accounts—depended upon the petition being earlier than the suit."

R., p. 28:

> "the rents are security just as the land is security from the time when the court intervenes; they become part of the mortgaged *res* because only so can the mortgagee be protected during the inevitable delay."

R., p. 28:

> "Either the bankruptcy should supersede the whole suit, as it does in the case of a winding up, or it should not touch it at all; the tail goes with the hide."

Upon the happening of a default and the appointment of a receiver in foreclosure the rents are just as much security for the debt as the real estate itself. This is a customary provision of all mortgages in New York State and expresses the state law.

Sullivan v. *Rosson*, 223 N. Y. 217.

To sustain the contention of the petitioner is to assert the unheard of doctrine that upon the filing of a petition in bankruptcy, there is effected a severance of the rents from the real estate, the State Court losing control of the rents to the Bankruptcy Court while retaining control of the real estate. The majority opinion observes that insofar as "straight bankruptcy" is concerned this would be a "revolutionary change" (R., p. 31).

The rents in the hands of the receiver never came into the possession, actual or constructive, of the Bankruptcy Court. Whatever title the trustee in bankruptcy acquired to either the rents or the real estate was subject to the ultimate outcome of the foreclosure proceeding with which the property was burdened at the time the petition was filed. Since the bankruptcy did not supersede that foreclosure proceeding, the property and its income remained in the custody of the State Court until completion of the foreclosure. Moreover, the trustee had to await the outcome of the State Court proceeding in order to determine whether the entire value of the property was required to satisfy the debt which it secured or whether there would be a surplus over and above the amount required to satisfy the debt. Until the surplus was determined, there was nothing which the bankruptcy trustee could claim. When it developed that there would be a surplus of rents in the

hands of the receiver the trustee was only one of several adverse claimants to such surplus. These rents were part of the *res* over which the State Court acquired prior jurisdiction and that court had the exclusive power to settle any controversies with relation thereto.

Dannel v. *Wilson-Weesner-Wilkinson Co.*, 109 Fed. (2) 364.

In re American Fidelity Corp., Ltd., 28 F. Supp. 462.

POINT III

The decision of the court below is not in conflict with any other decision cited by the petitioner.

The petitioner makes the point that the decision of the court below is in conflict with *Matter of Park Beach Hotel Building Corp.* (96 Fed. [2] 886), *In re Rosenberg* (128 Fed. [2] 924), and *Matter of Central Forging Co.* (31 F. Supp. 1038), and urges that this Court grant the petition in order that the seeming conflict may be resolved.

There is no conflict. The basic difference between the case at bar and the alleged conflicting cases is that the former is a "straight bankruptcy" case, whereas the others are reorganization cases. Both the majority and minority opinions below recognized this basic difference.

The prevailing opinion, in speaking of the difference between ordinary bankruptcy on the one hand and a "plan" under Chapter 10, or an "arrangement" under Chapter 12, on the other, states as follows (R., p. 29):

> "there is nothing anomalous or inconsistent in saying that section 2(a)(21) when applied to proceedings under these chapters includes foreclosure receivers, but does not when applied to 'straight bankruptcy'—liquidation. Since the section merely grants a new remedy and was not intended to enlarge the jurisdiction of the Bankruptcy Court, the distinction was

one which we should expect and which was indeed necessary. This is so because even as to valid mortgages and other liens, proceedings under these chapters are supersessive, just as 'straight bankruptcy' is supersessive as to state insolvency proceedings or 'equity receiverships'."

The dissenting opinion states (R., p. 38):

"In ordinary bankruptcy, to be sure, Congress has left secured property outside the distribution of hierarchy."

In *Matter of Park Beach Hotel Building Corp.* (supra) the debtor filed a petition for reorganization, not an ordinary bankruptcy petition. Upon the filing of the petition, the foreclosure receiver surrendered possession of the property to the trustee. In that case there could be no question of conflicting jurisdiction between the Bankruptcy Court and the State Court for admittedly the reorganization proceeding superseded the State Court foreclosure and the State Court receiver, recognizing such supersession, surrendered possession of the real estate. In the case at bar there was no supersession upon the filing of the petition in ordinary bankruptcy and there was no surrender of the property to the Bankruptcy Court by the receiver. These distinguishing elements conclusively demonstrate that there can be no real conflict in statutory interpretation as between the two cases.

The petitioner argues that had the *Park Beach Hotel Building Corp.* case been presented to the court below that court would have decided it differently than the Seventh Circuit Court did. We disagree. The reasoning of the prevailing opinion of the court below persuades us that that court would have decided the *Park Beach Hotel Building Corp.* case exactly as the Seventh Circuit Court decided it.

Matter of Central Forging Co. (31 F. Supp. 1020), likewise cited by petitioner as being in conflict, is similarly

distinguishable because it was a reorganization proceeding and not an ordinary bankruptcy proceeding looking toward liquidation.

CONCLUSION

The application for writ of certiorari should be denied.

Respectfully submitted,

JOHN P. MCGRATH,
Attorney for Harry Hanley, as Receiver.

Supreme Court of the United States

OCTOBER TERM 1942

No. 551

IN THE MATTER

OF

JOHN M. RUSSELL, INC., Bankrupt.

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc.,

Appellant,

vs.

HARRY HANLEY, Receiver,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEE

JOHN P. McGRATH,
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DENIS M. HURLEY,
with him on the Brief.



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Appellant,

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Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEE

Opinions Below

The opinion of the District Court is reported in 43 Fed. Supp. 128 (R. 14, 15). The opinion of the Circuit Court of Appeals is reported in 130 Fed. (2d) 369 (R. 17-31).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a).

Statement

The appellee was receiver of rents and profits in an action brought in the New York State Supreme Court to foreclose a mortgage on property of the bankrupt. The appellant, trustee in bankruptcy, applied to the United States District Court for the Eastern District of New York for an order to compel the appellee as such receiver to file his account in the bankruptcy court. The District Court denied the motion, the Circuit Court of Appeals affirmed by a two to one decision and this Court granted certiorari.

Facts

On or about August 13, 1940, an action was commenced in the Supreme Court of the State of New York, Nassau County, to foreclose a third mortgage in the sum of $16,900 on a three-story, forty-five family apartment building located at Great Neck, New York. Thereafter, on August 17, 1940, an order was made by a Justice of the Supreme Court of the State of New York appointing Harry Hanley the Receiver of the rents and profits of the real property under foreclosure. The title to this real property was in the name of John M. Russell, Inc., the bankrupt. Immediately following his appointment on August 17, 1940, the Receiver, Harry Hanley, duly qualified by filing a bond in the sum of $12,000 and actually went into possession of the mortgaged premises, and was in possession and control thereof on August 31, 1940, when the petition in bankruptcy of John M. Russell, Inc., was filed (R. 5, 6).

While the said foreclosure action covering the third mortgage of $16,900 was pending, another foreclosure action was brought to completion in the State Court by a mechanic's lienor, or lienors, who were not paid for work they had done and materials they had furnished in the construction of the building and who had filed liens which were subordinate to the third mortgage. The record does not indicate when this mechanic's lien foreclosure was commenced and whether the jurisdiction of the State Court attached prior to or subsequent to the filing of the bankruptcy petition. At any rate, a judgment of foreclosure and sale was granted and a sale of the premises actually took place on February 21, 1941, at which time the premises were sold at public auction to Apartment Investing Corporation for $20,000 (R. 6).

As a result of the said sale the title of the trustee in bankruptcy to the equity, if any, in the said real estate was extinguished. Likewise, any claim which the Trustee had to any surplus rents collected by the Receiver, over and above expenses and prior claims, was terminated as of February 21, 1941.

The third mortgage foreclosure action in which Hanley was the Receiver, was continued following the said sale and a judgment was entered on June 13, 1941. The property was advertised for sale pursuant to such judgment but before the sale was actually held the judgment was paid and satisfied on August 13, 1941. Promptly thereafter the appellee presented his account to the State Court and petitioned for the settlement thereof and for his discharge as Receiver (R. 7).

It should be noted that although the receivership ran from August, 1940, to August, 1941, the real property was owned by three different owners during that period, i.e., John M. Russell, Inc., from August 17, 1940, until the filing of the bankrupt's petition on August 31, 1940; the trustee in bankruptcy up to February 21, 1941, and Apartment Investing Corporation from February 21, 1941, until the termination of the receivership. Upon the settlement of

the Receiver's account the State Court had before it not merely the question of the accuracy of the receipts, propriety of disbursements, and the question of compensation for the Receiver and his attorney, but also the Court was called upon to apportion the net rents, if any, so that the trustee in bankruptcy would receive only those net rents allocable to the period up to February 21, 1941, and the Apartment Investing Corporation would receive the net rents which accrued subsequent to February 21, 1941.

The papers had already been served in connection with the Receiver's application to the State Court for settlement of his account when the trustee in bankruptcy made the application to the District Court for an order directing the Receiver to file his account in that court (R. 12).

The District Court seemed inclined to permit the State Court to retain jurisdiction and made no order in the matter while the accounting was being heard by the State Court. Meanwhile the appellant went into the State Court and filed objections to the Receiver's account. An official referee of the State Court was designated to hear and determine the account and to pass upon the objections. After a trial of the issues the official referee overruled the objections and determined the account (R. 12, 13). After a complete disposition of the account in the State Court the United States District Court Judge requested the parties to submit further affidavits as to what had transpired in the State Court and in compliance with such request the affidavits appearing at pages 9 and 12 of the record were submitted. Thereupon the District Court Judge gave his assent to the action of the State Court and denied the motion of the trustee in bankruptcy (R. 15).

In the statement of the case set forth in appellant's brief (p. 3) it is stated that although the Receiver was appointed on August 17, 1940, his accounting shows that he did not collect any rents from the property until after September 1, 1940. From this statement the appellant argues that the Receiver did not collect any rent until after the bankruptcy. The record does not sustain this assertion.

It appears (R. 6) that the Receiver actually collected rents during the month of August, 1940. This was a new building. When the Receiver took possession in August, 1940, he began to make leases forthwith. Such leases called for rentals to start September 1, 1940, or thereafter, but leases were executed in August, 1940, and the first rent payments were made upon execution.

Statement of Points

POINT I—The State Court retained jurisdiction of the foreclosure action notwithstanding the bankruptcy, and the State Court Receiver was not displaced or superseded by the trustee in bankruptcy.

POINT II—The provisions of the Bankruptcy Act, Sections 2a21 and 69d, have no application to a receiver not displaced or superseded by the bankruptcy.

POINT III—The Bankruptcy Court had power to assent to the settlement of the Receiver's accounts by the State Court.

POINT I

The State Court retained jurisdiction of the foreclosure action notwithstanding the bankruptcy, and the State Court Receiver was not displaced or superseded by the trustee in bankruptcy.

Before considering the effect of the amendments to the Bankruptcy Act set forth in Sections 2a21 and 69d, it seems advisable to establish in our minds what the law was before these amendments were enacted. When we have done this we shall then consider to what extent these amendments changed the existing law.

The appellant has argued that even before the amendments the Bankruptcy Court could compel a State Court

Receiver to account to it. Sections 2a21 and 69d, he contends, merely make statutory the established "case-law" (Appellant's Brief, p. 14). Appellant justifies this contention upon the broad ground that the jurisdiction of the Bankruptcy Court is paramount and exclusive and hence that Court can make any direction to any Receiver irrespective of the source, manner or purpose of his appointment. To support this contention he relies upon *Taylor* v. *Sternberg*, 293 U. S. 470. He ignores completely *Stratton* v. *New*, 283 U. S. 318.

Stratton v. *New* (supra) recognizes a limitation upon the paramount and exclusive jurisdiction of the Bankruptcy Court which is controlling in this case. The question before this Court in that case was whether the Court of Bankruptcy had the power to enjoin a suit in the State Court to enforce a valid lien and sell the real estate subject thereto where such suit was commenced more than four months prior to the filing of the petition in bankruptcy. The Court stated (p. 321):

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition (Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300; 56 L. ed. 208, 32 S. Ct. 96). It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the District Court having acquired the exclusive right to administer all property in the bankrupt's possession (citing cases). It may inquire into the validity of liens, marshal them, and control their enforcement and liquidation (citing cases).
>
> Though a lien be not discharged by bankruptcy, its owner may not, without the Bankruptcy Court's permission, institute proceedings in a State Court to enforce it, since his doing so might interfere with the orderly administration of the estate. Thus a mortgagee will be restrained from instituting or proceeding further in a foreclosure action, begun after the date

of the petition in bankruptcy, and a creditor holding a valid judgment more than four months old will be enjoined from enforcing its lien by suit brought after the date of the petition and his lien, created by judgment, entered within four months is voided. The Court of Bankruptcy has jurisdiction to administer the property regardless of the lien and will restrain the prosecution of that action to enforce it.

The Bankruptcy Law contains no express provision preserving liens acquired by local proceedings more than four months before the petition is filed, but it is clearly implied that they shall be saved from the operation of the law, for section 67f voids only liens obtained by local proceedings within that period. It has accordingly been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the Bankruptcy Court in the distribution of the estate, in accordance with applicable local law.

There is no dispute concerning these propositions. Appellants, however, assert that the jurisdiction in bankruptcy to ascertain, marshal and enforce liens, is not exclusive, but concurrent with that of other courts competent to that end, if the liens in question are not discharged but recognized as valid in bankruptcy, and that the rule of comity is applicable, that the court first lawfully taking jurisdiction shall retain it (Wabash R. Co. v. (323) Adelbert College, 208 U. S. 38; 52 L. ed. 379; 28 S. Ct. 182; Harken v. Brundage, 276 U. S. 36; 72 L. ed. 457; 48 S. Ct. 268). They contend that when the petition was filed in this case, the State Court was proceeding in a suit within its jurisdiction and had taken possession of the res for the purpose of enforcing such a lien. * * *

* * * * * * *

If appellants are correct in their contention that the creditor's suit was no more than a proceeding to enforce liens saved from discharge by the subsequent bankruptcy of the debtor, it follows, as they claim, that the District Court, sitting in bankruptcy, had no power to enjoin that action."

The Court then summarizes the cases of *Metcalfe Bros.* v. *Barker*, 187 U. S. 165, *Clarke* v. *Larremore*, 188 U. S.

486, and *Globe Banking Company* v. *Martin*, 236 U. S. 288, and continues at page 326:

> "Following these cases the Federal Courts have with unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the Bankruptcy Court is without jurisdiction to enjoin the prosecution of the creditor's action instituted prior to the filing of a petition in bankruptcy to bring about a judicial sale of the real estate."

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> "The trustee in bankruptcy may intervene in such suits to protect the interests of the estate.
>
> It is clear that if the action in the State Court was merely in the nature of an action or proceeding to obtain the avails of the judgment lien, it should not have been enjoined by the District Court."

The Court made reference to a statement in the opinion in *In re Watts*, 190 U. S. 1, in which the Court stated that the passage of the Bankruptcy Act did not in itself suspend the statute of Indiana in relation to the appointment of Receivers but merely that such Receivers were displaced by bankruptcy when the State proceeding took the form of a winding up of the affairs of the corporation. In commenting upon that statement in the opinion, this Court said:

> "This was merely a statement of the well settled principle that a general winding up receivership is tantamount to an insolvency proceeding which will be superseded by bankruptcy, and a fortiori, if, as in that case, the petition is filed within four months of the appointment of the Receiver. The language quoted from that case by appellee respecting the paramount and exclusive jurisdiction of the Court of Bankruptcy must be read in connection with the facts on which it is predicated.
>
> Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the District Court jurisdiction to enjoin pending

suits in State Courts deal with the situation where a lien was acquired within four months of the filing of the petition, or where after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As hereofore noted, there are a few cases which have held that the Bankruptcy Court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy; but these cases are contrary to the decisions of this court and to the great weight of Federal authority."

If we recognize the holding in *Stratton* v. *New* as a limitation upon the paramount and exclusive jurisdiction of the Bankruptcy Court, we then have no difficulty in concluding that prior to the amendments of the Bankruptcy Act set forth in Sections 2a21 and 69d, a Receiver of the rents and profits, appointed in a foreclosure action pending in a State Court, was not subject to the jurisdiction of the Bankruptcy Court unless the action was one which the Bankruptcy Court had the power to enjoin. Viewed in this light we can have no quarrel with appellant's Point I in which he states that the Receiver is the custodian of the res which is the subject of the litigation and as such he holds possession for the owner. The Receiver is the custodian of the property as an officer of the Court appointing him and is accountable to that Court alone.

Unless *Stratton* v. *New* and the great weight of Federal authority which it epitomizes are to be thrown completely into the discard, we do not see how it can be seriously contended that a Bankruptcy Court which cannot interfere with the jurisdiction of a State Court in a previously pending foreclosure suit can, nevertheless, subject to its orders, the Receiver who has custody of the res which the Bankruptcy Court has not the power to reach. The mere statement of the contention furnishes the answer to it.

We have then the proposition that *Stratton* v. *New* places a limitation upon the paramount and exclusive jurisdiction of the Bankruptcy Court. Taking *Taylor* v. *Sternberg* (supra) as authority for the broad rule of paramount and

exclusive jurisdiction, and *Stratton v. New* as authority for the limitation upon such jurisdiction, we are able to formulate a doctrine which should guide us in determining whether or not a Bankruptcy Court in a given case can reach and control the funds in the hands of a Receiver. That doctrine may be simply stated as follows: Where the bankruptcy supersedes the State Court proceeding, all authority for the continuance of the State Court proceeding comes to an end and the State Court Receiver becomes immediately accountable to the Bankruptcy Court. He must surrender to the Bankruptcy Court the property in his possession and such duty carries with it a right in the Bankruptcy Court to compel the Receiver to properly account to it for such property. Conversely, if the State Court is not superseded by the bankruptcy, no jurisdiction in the Bankruptcy Court attaches to the Receiver. The soundness of this doctrine will stand up against any test.

The appellant has cited many cases in support of his contention that the Bankruptcy Court had power over the State Court Receiver even before the amendments to the Bankruptcy Act. He has also cited some cases decided after Sections 2a21 and 69d were enacted which he claims likewise establish such power in the Bankruptcy Court, either because such power always existed or because such power derives from the new statutory provisions.

An analysis of each case cited by the appellant demonstrates that in no instance has any court been unfaithful to the doctrine that supersession is a prerequisite to jurisdiction over the State Court officer. A brief reference to some of the cases will show that this is true.

In *Taylor v. Sternberg*, 293 U. S. 470, Sutherland, J., points out very clearly that the State Court was superseded by the Bankruptcy Court. The Receiver had been appointed in a state insolvency proceeding. Pages 472-473:

> "In the present case, with the supervening bankruptcy, the possession of the State Court came to an end, and that of the Bankruptcy Court immediately

attached. This result was binding upon the State Court and equally binding upon the Receiver as custodian for that court. Before the petition in bankruptcy was filed the Receiver's compensation, as well as that of his counsel, were matters wholly within the control of the State Court, but with the filing of the petition in bankruptcy the power of the State Court in that respect ceased; and its order fixing the compensation of the Receiver and its counsel was a nullity because made without jurisdiction, such jurisdiction having passed to the Bankruptcy Court."

In *In re Diamond's Estate*, 259 Fed. 70, the Receiver was appointed in a partnership dissolution proceeding. The partnership was insolvent at the time the State Receiver was appointed. The adjudication of bankruptcy gave the Federal Court jurisdiction of the partnership property; the bankruptcy proceeding superseded the winding up of the partnership in the State Court. The State Court recognized such supersession and directed its Receiver to turn over the property to the Receiver in bankruptcy.

In *Lyon Bonding and Surety Co.* v. *Karatz*, 262 U. S. 640, Brandeis, J., says, at page 642:

> "Even where the court which appoints a Receiver had jurisdiction at the time but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the Bankruptcy Court."

In re Gross v. *Irving Trust Co.*, 289 U. S. 342, the Receivers were appointed by the Court of Chancery of New Jersey. The bankruptcy superseded the State Court proceeding and it was because of such supersession that the State Court lost its power to fix the compensation of its Receivers and to direct payment thereof out of the bankrupt estate.

In *State of Missouri* v. *Angle* (*In re Sage*), 236 N. Y. 644, the bankrupt Sage was a private banker. A State Court Receiver of the bankrupt was appointed. It was

held that the bank was the property of the bankrupt and the State liquidation proceeding in which the Receiver had been appointed was superseded by the bankruptcy.

In the cases of *In re Central Forging Co.*, 31 Fed. Supp. 1020, and *In re 188 West Randolph Street Building Corp.*, 88 Fed. (2d) 257, the bankruptcy superseded the State Court proceeding for in each of those cases the State Court Receiver surrendered possession of the property to the trustee in bankruptcy.

In *Matter of Park Beach Hotel Building Corp.*, 96 Fed. (2d) 886, there was clearly supersession. In that case as well as in *In Re Central Forging Co.* and *In re 188 West Randolph Street Building Corp.* (supra) the petition was for reorganization, not an ordinary bankruptcy petition. Upon the filing of the petition in each of these cases the foreclosure Receiver surrendered possession of the property to the trustee. There can be no question of conflicting jurisdiction between the Bankruptcy Court and the State Court in these cases for it is recognized that in this type of proceeding the taking of jurisdiction by the Bankruptcy Court terminates the jurisdiction of the State Court.

POINT II.

The provisions of the Bankruptcy Act, Sections 2a21 and 69d, have no application to a Receiver not displaced or superseded by the bankruptcy.

We consider now the statutes themselves, their wording, history and purpose. Section 2 is a jurisdictional section. It contains the grant of power under which the bankruptcy courts act. Under the 21st subsection of subdivision (a) the bankruptcy courts are invested with jurisdiction to require receivers or trustees in proceedings not under this Act to turn over property in their hands to the bankruptcy receiver or trustee, and to account to the bankruptcy court. This section contains no mandate to the State Court Re-

ceiver. He is not obliged to move under it unless the Bankruptcy Court "requires" him to do so.

Section 69d makes a receiver or trustee not appointed under the Bankruptcy Act "accountable to the Bankruptcy Court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition * * *" and directs him to file a sworn schedule of the property in his hands and a sworn statement of the administration of the estate.

We believe that these sections were intended to apply only to those cases where the bankruptcy proceeding supercedes the other proceeding with the result that the bankruptcy receiver or trustee displaces the previous receiver or trustee. The history and purpose of the statutory amendments support this view and the language used is entirely in harmony with such interpretation.

It appears from the report of the House Committee on the Judiciary (Report No. 1409, 75th Congress, First Session) that the purpose of the amendment was to increase efficiency in the administration of bankrupt estates. In the words of the prevailing opinion below "the section merely grants a new remedy and was not intended to enlarge the jurisdiction of the Bankruptcy Court" (R. 20). The following quotations from the report of the House Committee on the Judiciary indicate the evils, to remedy which the sections were enacted.

The report says of Section 2a21:

> "This clause is entirely new and gives to Bankruptcy Courts the much needed power to regulate the administration of equity receiverships, assignments for benefit of creditors and the like, supervened by bankruptcy proceedings within the four months period. The courts have held that trustees in bankruptcy are relegated to a plenary suit as to all disbursements made prior to the filing of the petition in bankruptcy, and that has resulted in long delay and considerable unnecessary expense. There is no logical reason why the Bankruptcy Court could not supervise these ex-

penditures *since all of the previous proceedings are nullified by the petition in bankruptcy followed by an adjudication.*" (Italics supplied.)

Clearly the House Committee was thinking in terms of Receivers in proceedings which are superseded by bankruptcy. The quoted language stresses the nullification of previous proceedings and the inference seems justified that, if the converse were true, i.e., that the State Court retained jurisdiction and the previous proceedings continued, concurrently with the bankruptcy, then the State Court should keep control of its Receiver.

The House Committee report says of Section 69d:

> "The new provision is designed to make it possible for equity receivers, where there is a supervening bankruptcy proceeding, to know just how to proceed with further administration during the period intervening between the filing of the involuntary petition in bankruptcy and the adjudication without danger to themselves and the equity estate. It is manifestly in the interest of efficiency in the conservation of assets."

Here again the Committee speaks of "equity receivers" and "supervening" bankruptcy. We believe that in using the word "supervening" the Committee really meant "superseding". The entire language is postulated upon supersession. No violence would be done to the object and purpose of Section 69d, as stated by the Committee, if a State Court were permitted to keep control of its Receiver in a foreclosure action of which it retains jurisdiction.

We know that "equity receivers" do not include foreclosure Receivers of the rents and profits. This Court has so decided in *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216. That case is especially helpful in pointing the way to a proper interpretation of the statutes now under consideration. In that case the question was whether

a receivership for the collection of rents and profits in a suit for the foreclosure of a mortgage is an "equity receivership" within the meaning of Section 77b of the Bankruptcy Act. In deciding that question the Court stated that the purpose of Section 77b, in the light of the history of the evils which it was intended to correct, should be taken into consideration in construing the language used. Judge Cardozo, writing for a unanimous court, held that the expression "equity receivership" as used in Section 77b was not intended to include Receivers of the rents and profits in foreclosure suits. He stated (pp. 219-224):

> "The remedy to be supplanted or more efficiently controlled had no relation to receiverships for the collection of rents and profits in actions of foreclosure. The remedy in view was the one generally known as an 'equity receivership' whereby the assets of a corporation were committed to the custody of a court until the time should arrive when they could be returned to the rehabilitated debtor, or if that should be impossible, divided among creditors. * * *
>
> However colloquial and uncertain the words had been in the beginning, they had won for themselves finally an acceptance and a definiteness that made them fit to play a part in the legislative process. They came into the statute through an amendment proposed when the bill which was adopted as 77b was passing through the Senate. * * * They came through freighted with the meaning imparted to them by the mischief to be remedied by the contemporaneous discussion. * * * In such conditions history is a teacher that is not to be ignored.
>
> Passing from the setting of the statute to a view of its internal structure we are brought to the same conclusion, but with added firmness of conviction. A receivership in a foreclosure suit is limited and special. The rents and profits are impounded for the benefit of a particular mortgagee, to be applied upon the debt in the event of a deficiency. (Freedman Savings and Trust Company v. Shephard, 127 U. S. 494, 32 L. ed. 163, 8 S. Ct. 1250; W. B. Worthen Co. v. Cavanough, 295 U. S. 56, 62, 79 L. ed. 1298, 1302; 55 S. Ct. 555; 97 Elr. 905; Sullivan v. Rosson, 223 N. Y.

217; 119 N. E 405; 4 Elr. 1400.) The corporation retains its other property, if it has any, unaffected in its power of disposition by the decree of sequestration. The creditors retain their remedies except against the income subjected to the lien. There is neither winding up of the business nor attempt to reorganize it and set it going anew. This is not the equity receivership of which the law makers were thinking if context and analogy have capacity to deliver up a lesson.

* * * It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy (citing authorities). On the other hand it is also common learning that not even a trustee in bankruptcy may override a valid mortgage lien or supersede a receiver who has been put into possession in fulfillment of the mortgage contract (citing Stratton v. New, supra, and other authorities). Section 77b does not make these precedents inapposite. True the suit for the foreclosure of a mortgage may be stayed or enjoined upon the showing of necessity (sec. 77b (c) (10)); the lien may be transferred to the proceeds of a sale (77b); at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved (77b (b) (e) (f) (h)) (citing authorities). Nowhere does the statute say, however, that those results or any of them shall follow automatically upon the approval of the petition as properly filed (sec. 77b (a)). Only by excluding a receiver in foreclosure from the scope of subdivision i can we avoid anomalous encroachments upon vested rights and interests.

Such a reading of the act will help at the same time in the avoidance of other consequences too harsh or incongruous to have been intended by the Congress. The statute speaks (77b (i)) of a receiver 'of all or any part of the property of a corporation'. These words will have a proper office if the receivership is understood to be a general one for liquidation or for cognate purposes. They will take care of a situation where only part of the property is within the jurisdiction so that not even an 'equity receivership' will be competent always, without ancillary orders, to give possession of the whole. But the situation is very different if the receivership in

view is one for the foreclosure of a mortgage. In its normal operation such a receivership does not connote possession of all of the property of the debtor, or even all the property within the appointing jurisdiction. The mortgage may be a lien upon one parcel, or a few, leaving other property of abundant value for payment of the debts. Indeed the cases must be many where the owner of a mortgaged building, not personally liable for the payment of the mortgage debt will hold it the part of prudence, whether he is solvent or insolvent, to let the building go. True indeed it is that in this case it so happens that the property subject to the mortgage is everything the debtor has. All that is but an accident which has little, if any, bearing upon the meaning of the act. True, it is also, that a court receiving a petition for reorganization in invitum may approve or disapprove it, and that any hardship growing out of the extreme or unusual situation may thereby be averted. Even so, the search at the moment is for a definition of an equity receivership that will tend to minimize anomalies and give consistency and coherence to the statutory rule. There is little persuasion in an argument that in despite of all anomalies, the system, if it is well administered, may manage to survive."

While the question before the Court in the *Duparquet* case was whether a foreclosure receivership is an "equity receivership" as that term was used in Section 77b, we submit that the rationale of the opinion applies with equal force to the statutory amendments now under consideration. While the Congress speaks of "receivers" and "trustees" in Sections 2a21 and 69d rather than "equity receivers", the report of the House Judiciary Committee indicates that it meant "equity receivers" and other officers comparable thereto. The opinion certainly is authority for our position that the words "receivers" and "trustees" can be given a limited interpretation so as to give full effect to the statutory amendments in every case where the Bankruptcy Court acquires exclusive jurisdiction and yet leave undisturbed the principle, so well established as to be called "common learning" by Justice Cardozo, that a

trustee in bankruptcy does not supersede a receiver in foreclosure where the jurisdiction to continue the foreclosure is undisturbed.

In the language of the majority opinion in the Court below (R. 19, 20):

> "It would be altogether anomalous to divorce from the land itself the income which accrues pendente lite. Indeed, when a court takes possession of mortgaged land by its receiver, it in effect merely anticipates its final action, acting in harmony with the general axiom that equity regards as done what ought to be done; if all the necessary steps could be taken together in pie-powder fashion, the property would be sold, the buyer would begin to receive the rents at once, and the mortgagee the interest upon the purchase price. The receivership is the nearest substitute; the rents are security just as the land is security from the time when the court intervenes; they become part of the mortgaged res because only so can the mortgagee be protected during the inevitable delay. For this reason it is extremely unlikely that when Congress left to the state courts jurisdiction over the land it should have intended to separate the rents. Indeed, the receiver is as much an arm of the court as the master whom it appoints to conduct the sale; it is as unwarranted an invasion of its power to compel the receiver to account as to compel the master. *Either the bankruptcy should supersede the whole suit, as it does in the case of a winding up, or it should not touch it at all; the tail goes with the hide.*" (Italics supplied.)

To sustain the contention of the appellant is to assert the unheard of doctrine that upon the filing of a petition in bankruptcy, there is effected a severance of the rents from the real estate, the State Court losing control of the rents to the Bankruptcy Court while retaining control of the real estate. The majority opinion observes that insofar as "straight bankruptcy" is concerned this would be a "revolutionary change" (R. 22).

The rents in the hands of the Receiver never came into the possession, actual or constructive, of the Bankruptcy

Court. Whatever title the trustee in bankruptcy acquired to either the rents or the real estate was subject to the ultimate outcome of the foreclosure proceeding with which the property was burdened at the time the petition was filed. Since the bankruptcy did not supersede that foreclosure proceeding, the property and its income remained in the custody of the State Court until completion of the foreclosure. Moreover, the trustee had to await the outcome of the State Court proceeding in order to determine whether the entire value of the property was required to satisfy the debt which it secured or whether there would be a surplus over and above the amount required to satisfy the debt. Until the surplus was determined, there was nothing which the bankruptcy trustee could claim. When it developed that there would be a surplus of rents in the hands of the Receiver the trustee was only one adverse claimant to such surplus. These rents were part of the res over which the State Court acquired prior jurisdiction and that Court had the exclusive power to settle any controversies with relation thereto.

The receivership covered two periods, one from August 17, 1940, to February 21, 1941, during which the trustee was the owner of the equity of redemption and hence entitled to the net rents, if any; the other, from February 21, 1941, until the termination of the receivership during which Apartment Investing Corporation was the owner of the equity of redemption, and in this period the trustee had no claim to the net rents. It was for the State Court to decide what portion, if any, of the surplus in the Receiver's hands, was the property of the trustee in bankruptcy. Until such determination there was no res to which bankruptcy jurisdiction could attach.

We have looked in vain in the dissenting opinion below for any substantial objection to the interpretation for which we contend. Reference is there made to the objection that the lien being enforced in the State Court may be invalid (R. 27). If that be so, the validity of the lien may be contested in bankruptcy and such contest would

furnish the basis for enjoining the State Court, at least until the validity of the lien was determined. In other words, supersession is possible in such a case and where the action is superseded, so is the Receiver. Reference is also made to a doubt entertained by the dissenting Judge based on *Stratton* v. *New* (supra) and *Isaacs* v. *Hobbs Tie & Timber Co.*, 242 U. S. 734. He says that it is not at all settled that the Bankruptcy Court's power of inhibiting foreclosure begun after bankruptcy cannot be extended back four months; that in *Stratton* v. *New* it was "held that where a receiver had been in possession more than four months before the bankruptcy, he could not be displaced. Thus the Supreme Court left undecided the status within four months" (R. 27).

We do not so read *Stratton* v. *New* and we believe the dissenting Judge has misconstrued the decision. In *Stratton* v. *New* the lien which was sought to be enforced in the State Court was a judgment lien and in order for it to have validity as against a subsequent bankruptcy it must have been procured more than four months prior to the filing of the bankruptcy petition. As we read the opinion of Justice Roberts, it stands for the proposition that if a State Court took jurisdiction of an action to foreclose a valid lien, even one day before the filing of the petition in bankruptcy, such foreclosure action should not be enjoined by the Bankruptcy Court. However, if the basis of the asserted lien is a judgment, the lien would not have validity unless the judgment was procured prior to the four months' period.

The real basis for the dissent is found in the following language of Judge Clark (R. 28):

> "If the cost of a foreclosure receivership were borne by the mortgagee and the equity fully turned over to the bankruptcy court, I would not be quite so solicitous of the bankruptcy power."

Apparently the real evil in the mind of the dissenting Judge was the control by the State Court of the cost of the

receivership. It was, in our opinion, because of this statement that the prevailing opinion spoke of the amendments, as construed in the dissent, as being "quite needless and galling to the State Courts' dignity". The majority of the Court were not merely being "epithetical". Nor were they being unduly indulgent of the feelings of the State Courts in the face of a proper exercise of bankruptcy jurisdiction. They were, in truth, recognizing that the only discernible reason for construing the statutory amendments as contended for by the appellant and the dissenting Judge, is seeming lack of confidence in the ability and willingness of the State Courts to exercise a proper restraint in passing on the allowances of the Receiver and his counsel. Such a view is clearly an affront to the dignity of the State Courts and in the case at bar, quite needless as well. We can understand how it would be galling to say to a State Court that it may retain jurisdiction to foreclose a lien, notwithstanding bankruptcy, but it cannot be trusted with the purely administrative problem of providing reasonable compensation to its own officer and his counsel.

POINT III

The Bankruptcy Court had power to assent to the settlement of the Receiver's accounts by the State Court.

The appellant takes the position that, if Sections 2a21 and 69d be construed as applicable to a Receiver of the rents and profits in a State foreclosure proceeding relating to a specific parcel of real estate owned by the bankrupt, then the order appealed from is erroneous and should be reversed.

The case presents no such clear-cut issue. Even if the appellant's construction of the statutory provisions be upheld, the order of the Court below affirming the order of the District Court should not be reversed. That order

of the District Court was not SOLELY predicated upon the inapplicability of the two statutory provisions to foreclosure Receivers of rents and profits. It was predicated rather upon the exercise of the discretion of the Bankruptcy Court in giving its consent and approval to the exercise of jurisdiction by the State Court and to the determination made by that Court after a full hearing on the merits in that Court.

In this view of the case, the legal interpretation of Sections 2a21 and 69d is academic so far as the order of the District Court is concerned. That order cannot be reversed except on a finding that the District Court abused its discretion in consenting to the exercise of jurisdiction by the State Court and acquiescing in the determination of that Court.

The District Court did not immediately act on the petitioner's application to compel the Receiver to account in the Bankruptcy Court. The motion was made on August 15, 1941. The District Judge, at the time of argument, stated that he was inclined to permit the State Court to retain jurisdiction (R. 12). The motion was decided February 10, 1942 (R. 16). In the meantime the accounting proceeding was fully tried and determined in the State Court and an order was made settling the account on December 3, 1941 (R. 13). Thereafter the District Judge asked for further affidavits (R. 9, 13). From these affidavits he concluded: "It is evident that the issues raised by the trustee were fully tried and a determination was made on the merits" (R. 14).

The District Court then assented to the determination of the State Court in the following language (fols. 55-56):

> "Considering the two sections of the Bankruptcy Act cited by the trustee, it appears that in the event that this court granted the trustee's motion, the receiver's accounting would be filed and the same objections would be interposed by the trustee. This would afford him two trials of the same issues already de-

termined in the Supreme Court of the State of New York. A fair interpretation of the Bankruptcy Act leads to the conclusion that it was not intended to give two trials of the same issues. As was said In Re National Motorship Corp. (96 Fed. (2) 88) '* * * state court's disposition was subject to assent of the Bankruptcy Court' indicating that full faith and credit can therefore be given by this court to the determination of the Supreme Court of the State of New York."

The District Court plainly predicated its decision upon the assumption that, if it had the legal power, under the statutory provisions relied on, to direct the Receiver to account in the Bankruptcy Court, it would withhold the exercise thereof, being satisfied that, in accord with applicable law of New York State, the proceedings in the State Court were proper and that the rights of those interested in the bankrupt estate had been safeguarded and protected. Under this decision the petitioner cannot be heard to complain that the Court misconstrued the statute. His only ground for a reversal would be a possible abuse of discretion by the District Judge. The petitioner makes no such claim.

The right of the Bankruptcy Court to consent to the exercise of jurisdiction by the State Court is well established.

Stratton v. *New*, 283 U. S. 318;
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734;
In re National Motorship Corp., 96 Fed. (2d) 88;
In re American Fidelity Corp., Ltd., 28 Fed. Supp. 462;
In re Canyon Pipe Line Co., 39 Fed. Supp. 233;
Wells v. *California Tomato Juice, Inc.* (D. C. of Appeals, 3rd D. Cal., 1941), 118 Fed. (2d) 916.

Even where the petition in bankruptcy antedates the foreclosure, and the jurisdiction of the Bankruptcy Court is clearly paramount (*Isaacs* v. *Hobbs Tie & Timber Co.*, supra), it has become frequent practice for mortgagees of

real property, upon the happening of a default, to apply to the Bankruptcy Court for leave to institute foreclosure proceedings in the State Court. Such applications are granted with great frequency, the Court generally requiring a further application to be made for consent of the Bankruptcy Court to the entry of judgment of foreclosure and sale in the State Court. In this way the Bankruptcy Court does permit the exercise of jurisdiction in the Courts of the State and at the same time retains sufficient control to prevent the entry of judgment if the circumstances should require that the entry of judgment be withheld.

The District Court in this case was content to limit its exercise of jurisdiction to the SUPERVISION of the settlement of the account by the State Court. In so doing the Court was fortified by ample precedent and it cannot be said that the objectives sought to be attained by the statutory amendments were not achieved.

It is not the spirit or the policy of the bankrupcty statute or the 1938 amendments thereto to proscribe completely the exercise of any jurisdiction by a State Court. The recent decision of this Court in *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Company*, 63 S. Ct. Rep. 93, supports the view that a State Court, having acquired prior jurisdiction, should not be precluded from protecting the rights of senior creditors where it is not shown that the continued exercise of such State Court jurisdiction would prejudice other interested parties. It affirmatively appears from the record in the instant case that the District Court was completely satisfied that the judicial settlement of the Receiver's accounts in the State Court did substantial justice to those interested in the bankrupt estate (R. 14, 15). The Circuit Court, in affirming the order of the District Court, likewise held that the Bankruptcy Court did not have *exclusive* jurisdiction over the foreclosure Receiver's accounts. For, in stating the problem presented on appeal, that Court said:

"The outcome of the appeal turns on whether Section 2 (a) (21) and Section 69 (d) of the Bankruptcy Act, which were added in 1938, gave *exclusive* jurisdiction to the Bankruptcy Court over the accounts of a receiver in foreclosure." (Italics ours.)

The disposition of the trustee's motion by the District Court, affirmed by the Court below, as a proper exercise of the legal discretion of the Bankruptcy Court, was clearly justified by the facts presented in this record. The minority opinion in the Court below, arguing for exclusive jurisdiction in the Bankruptcy Court over the foreclosure Receiver's accounts as mandatory under Section 69d, is largely predicated upon "public policy", the opinion referring to "a cutting down of exorbitant expenses of foreclosure" and to the claim that "the Bankrupcty Court is now held to have no control over his (the receiver's) disbursements, and powerless to prevent him from paying himself and his attorney very well and leaving only a deficit for the estate" (R. 28, 29).

There is no basis in the law nor in the facts contained in this record for such assertions. The minority opinion completely ignores what was so plainly pointed out in the majority opinion, namely, that even if the District Judge directed the Receiver to repeat his accounting in the Bankruptcy Court, the result would have been precisely the same. This is so because in the Bankruptcy Court the law of New York State with respect to the settlement of a foreclosure Receiver's accounts would be applied because the State law governs (Opinion below, citing *In re Humeston*, 83 Fed. [2d] 187, C. C. A. 2).

The decision of the District Judge, affirmed by the Circuit Court, was good common sense as well as good law. He merely decided to accept the Receiver's account as judicially settled by the State Court in accordance with the law of New York. It appeared to him on the face of the record that the substantive, as well as the procedural, law of New York had been fully complied with. There was

no point, therefore, in compelling a needless repetition of the account in the Bankruptcy Court where the same law of New York would again be followed.

The law of New York governing the instant situation has been referred to in part by the Court below in these words:

> "As soon as the receiver qualified, all the rents were sequestered for the benefit of the third mortgagee. That is the law of the state (*Sullivan* v. *Rosson*, 223 N. Y. 217) and the state law governs."

The Real Property Law of New York governs the construction of statutory clauses and covenants contained in mortgages and bonds. *Inter alia*, the statute provides that:

> "A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver', must be construed as meaning that the mortgagee, * * * in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness" (Sec. 254, subd. 10).

Although the owner of the equity of the real property being foreclosed does retain the naked legal title to the rents, the rents belong in equity to the holder of the mortgage by virtue of the assignment "as further security for the payment of the indebtedness". The rents, therefore, in the hands of the Receiver, are just as much subject to the equitable lien of the mortgagee, and subject to his equitable rights and remedies, as is the land being foreclosed (Idem, Sec. 60); *Van Rensselaer* v. *Read*, 26 N. Y. 558).

With this background, we deem it pertinent to briefly outline other phases of the law of New York State touching this

case, which the District Court had the right to judicially notice and to apply in deciding the motion.

A Receiver in New York is a public officer (N. Y. Public Officers Law, Sec. 28). His duties are prescribed by statute and he is compelled to furnish a bond (N. Y. Rules of Civil Practice, Rule 175 et seq.; Civil Practice Act, Art. 60, Secs. 974-977b). Pursuant to the laws of New York, the Receiver in this case was allowed only the usual statutory commissions, nothing more. The Receiver collected rents totalling $30,533.05. The commissions allowed him amounted to $1,526.65 (R. 7). This amounts to exactly 5% upon the sums received and disbursed by him as allowed by law (N. Y. Civil Practice Act, Secs. 1547, 1547a).

A foreclosure Receiver in New York is compelled by law to keep an accurate, detailed written account, which is open to inspection by any person whose rights are affected by the litigation (N. Y. Rule of Civil Practice 181). Under the rules of the State Court which had jurisdiction of the foreclosure in which this Receiver was appointed, he was bound to make deposits in a depository designated by the Court and permitted to make no withdrawals except as directed by the Court on checks signed by the Receiver and countersigned by the official surety on his bond (Rule 13, Rules N. Y. Supreme Court, Nassau County).

The Receiver's account was rendered and judicially settled in accordance with the law of New York. The procedure regulating the disposition of moneys held by the Receiver has been embodied in statute (N. Y. Civil Practice Act, Secs. 1083, 1083a; *Bedcro Realty Corp.* v. *Title Guarantee & Trust Co.*, 37 N. Y. S. [2d] 529).

The District Court properly relied upon the presumption that the judicial acts of the State Court were regular and according to law. The trustee completely failed to sustain his burden of producing evidence to the contrary (*United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1).

CONCLUSION

The order of the Circuit Court of Appeals for the Second Circuit affirming the order of the District Court should be affirmed with costs.

Dated, Brooklyn, New York, February 10, 1943.

JOHN P. McGRATH,
Attorney for Appellee.

DENIS M. HURLEY,
with him on the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 551.—October Term, 1942.

Allan D. Emil, As Trustee in Bankruptcy of John M. Russell, Inc., Petitioner,
vs.
Harry Hanley, Receiver.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 15, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

John M. Russell, Inc., was the owner of an apartment house in New York. On August 13, 1940, a foreclosure suit by a third mortgagee was filed. On August 17, 1940, the state court appointed respondent receiver of the rents and profits of the apartment house. On August 31, 1940, an involuntary petition in bankruptcy was filed against John M. Russell, Inc. of which petitioner was subsequently appointed as trustee. Respondent collected the rents from the premises from the time of his appointment in August, 1940 to and including August, 1941. While that foreclosure suit was pending, mechanics liens, subordinate to the third mortgage, were foreclosed, a sale was had, and the property purchased by Apartment Investing Corporation. That was in February, 1941. Judgment in the mortgage foreclosure suit was entered in June, 1941, and on August 13, 1941, before the sale was held, the judgment was paid and satisfied by Apartment Investing Corporation. Thereafter, respondent presented his accounts to the state court for settlement. Petitioner applied to the bankruptcy court for an order directing respondent to file his account in that court. While that motion was pending, the motion in the state court came on for a hearing. Petitioner appeared and filed his objections to respondent's accounts. His objections were overruled,[1] the accounts approved, and respondent discharged by

[1] The court holding that all rights of the bankrupt in the real property were cut off February 24, 1941; that on that day there was a deficit in the receiver's account; and that the balance of rents had accrued subsequent to February 24, 1941.

the state court. Thereafter the bankruptcy court denied petitioner's motion. 43 Fed. Supp. 128. The Circuit Court of Appeals affirmed by a divided vote. 130 F. 2d 369. We granted the petition for a writ of certiorari because of the importance of the problem in the administration of the Bankruptcy Act.

Petitioner contends that § 2(a)(21) and § 69d make it obligatory on the respondent as a non-bankruptcy receiver to account to the bankruptcy court. These provisions of the Bankruptcy Act are new. They were added in 1938 by the Chandler Act. 52 Stat. 840, 11 U. S. C. § 11(a)(21), § 109d. Sec. 2(a)(21) gives to the bankruptcy court the power in straight bankruptcy proceedings to require "receivers or trustees appointed in proceedings not under this Act" within four months of bankruptcy (1) "to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act", and (2) "to account to the court for the disposition by them of the property" of the bankrupt.[2] Sec. 69d makes a "receiver or trustee, not appointed under this Act, of any of the property" of the bankrupt "accountable" to the bankruptcy court for "any action taken by him subsequent to the filing of such bankruptcy petition."[3] These

[2] Sec. 2(a)(21) sets forth as one of the enumerated powers of courts of bankruptcy, the power to: "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however*, That such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

[3] Sec. 69d provides: "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act, of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a

sections are in part declaratory of the law as it existed prior to the Chandler Act. Thus § 2(a)(21) plainly includes the case where a lien against the debtor's property was acquired by some legal or equitable proceeding within four months of bankruptcy. Prior to 1938 such liens did not survive bankruptcy (*Straton* v. *New*, 283 U. S. 318, 322); and bankruptcy superseded the proceedings out of which they arose. Remington, Bankruptcy (4th ed.) § 2067-§ 2071. But the accountability of the non-bankruptcy receiver or trustee presented some difficulties prior to the Chandler Act. When bankruptcy superseded the prior proceedings, all disbursements subsequent thereto were, of course, subject to the exclusive control of the bankruptcy court. *In re Diamond's Estate*, 259 Fed. 70; *Moore* v. *Scott*, 55 F. 2d 863; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640, 642; *Gross* v. *Irving Trust Co.*, 289 U. S. 342. While such disbursements were generally subject to the summary power of the bankruptcy court (*Taylor* v. *Sternberg*, 293 U. S. 470), an accounting for disbursements made prior to bankruptcy required a plenary suit. *Loveless* v. *Southern Grocer Co.*, 159 Fed. 415; 1 Collier, Bankruptcy (14th ed.) pp. 320-321. And see *Galbraith* v. *Vallely*, 256 U. S. 46; *In re Jack Stolkin, Inc.*, 42 F. 2d 829. Sec. 2(a)(21) by substituting a summary proceeding was designed to eliminate the delay and cost of a plenary suit and to provide a more effective control over prior disbursements. See H. Rep. No. 1409, 75th Cong., 1st Sess., p. 20; Weinstein, The Bankruptcy Law of 1938, pp. 16-17.

Does § 2(a)(21) go further and apply to a case where a receiver is appointed within four months of bankruptcy as an incident to enforcement of a mortgage lien whose validity is not challenged? Prior to the Chandler Act such proceedings were not superseded by bankruptcy. They survived bankruptcy, the interest of the estate in them being protected by the intervention of the bankruptcy trustee. *Straton* v. *New*, *supra*, pp. 326-327, and cases cited. Under the earlier Act it made no difference whether such a proceeding was instituted prior to or within the four months period. Where the lien survived bankruptcy, prior

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sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of an, since his appointment, and a sworn statement of his administration of the estate. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

proceedings to enforce it would not be enjoined by the bankruptcy court. 1 Collier, *op. cit.*, pp. 306-309; *Straton* v. *New*, *supra*, p. 326, nt. 6. Sec. 2(a)(21) read literally would call for a different result in that foreclosure receivers would have to turn over to the bankruptcy court all the property in their possession or under their control, and account to it. In this case, since the receiver was only a receiver for rents and profits it would mean that the foreclosure would go on apace in the state court while the funds collected by the receiver would be turned over to the bankruptcy court for administration. The argument advanced in support of that view is that with such power the bankruptcy court could better protect the interests of the estate in the foreclosure proceeding.

But we do not think that that was part of the purpose of § 2(a)(21). As we have stated, the main purpose of § 2(a)(21) was to give the bankruptcy court control over disbursements made in non-bankruptcy proceedings prior to the filing of the petition. The House Judiciary Committee in its report stated: "There is no logical reason why the bankruptcy court could not supervise these expenditures, since all of the previous proceedings are nullified by the petition in bankruptcy followed by an adjudication. The principle is the same as that involved in section 60d of the act where it is provided that fees paid to the attorney for the debtor prior to bankruptcy and in contemplation thereof are subject to review by the bankruptcy court." H. Rep. No. 1409, *supra*, p. 20. That is as plain an indication as could be made that § 2(a)(21) was designed to define the powers of the bankruptcy court only where bankruptcy superseded the prior proceedings.[4] The language of § 2(a)(21) squares with that express declaration. When Congress wrote the four months proviso into § 2(a)(21) it was not writing on a clean slate. The presence of that proviso suggests the type of problem with which Congress was dealing. *Straton* v. *New*, *supra*, indicates the importance of that period in a determination of what liens did not survive bankruptcy and when bankruptcy proceedings superseded prior proceedings. The 1938 Act, like its predecessor, makes the four month period part of the critical test for determining what liens do not survive bankruptcy. One example is to be found in

[4] We do not, of course, include that supersession which flows from the fact that state insolvency laws are involved which are "tantamount to bankruptcy." Straton v. New, *supra*, p. 327.

§67a(1) which provides that liens "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months"[3] of bankruptcy are null and void on certain conditions. That section illustrates the relevancy of the four month period to this type of problem. If § 2(a)(21) is read to extend the power of the bankruptcy court to the present situation,[5] the four month period will have acquired a new significance in bankruptcy law. We cannot help but think that if Congress had set out to make such a major change, some clear and unambiguous indication of that purpose would appear. But we can find none. Moreover, such an interpretation would lead in many cases to a division of authority between state and federal courts. Thus in this case the state court would remain in charge of the foreclosure; the bankruptcy court would have exclusive control over the receiver's receipts. An interpretation which leads to a division of authority so fraught with conflict will not be readily implied.

It is argued, however, that the provision in § 2(a)(21) concerning proceedings under chapters X and XII indicates a purpose to include the type of receiver we have here. It seems clear that such a foreclosure receiver is included within § 2(a)(21) where proceedings under Ch. X have supervened. But the fact that a foreclosure receiver is included for one purpose does not necessarily mean that he is included for another. Plans of reorganization under Ch. X may (§ 216) and commonly do affect the rights of mortgagees. Hence § 148 provides that an order approving a petition under Ch. X operates to stay a pending mortgage foreclosure or other proceeding to enforce a lien against the debtor's property.[6] And § 256 and § 257 provide that the trustee (or debtor) acquires all rights in, and the right to immediate possession of, the property of the debtor under the control of a receiver or trustee appointed in a prior proceeding in any federal or state court. That is to say, a Ch. X proceeding supersedes a

[5] We do not reach the question, reserved in Duparquet H & M Co. v. Evans, 297 U. S. 216, 224, whether the appointment of a foreclosure receiver might be an act of bankruptcy under § 3(a)(5). See In re 211 East Delaware Place Bldg. Corp., 14 F. Supp. 96. It was suggested in Randolph v. Scruggs, 190 U. S. 533, 536, that bankruptcy superseded a general assignment for the benefit of creditors made within the four month period since the making of the assignment was an act of bankruptcy. And see Remington, *op. cit.*, § 2971.

[6] And unlike proceedings under § 77B (Duparquet H & M Co. v. Evans, 297 U. S. 216), a mortgage foreclosure is adequate under certain conditions for a creditor's petition under Ch. X. § 131(4).

pending mortgage foreclosure. We thus find § 2(a)(21) performing the same function when applied to Ch. X proceedings[7] as it does when applied to ordinary bankruptcy. We conclude that the Circuit Court of Appeals was correct in reading the word "receivers" distributively. Such a construction fits the statutory scheme as a whole. The other interpretation results in a distortion which the language of § 2(a)(21) makes unnecessary and which its history does not warrant.

Little need be said about § 69d. It must be read in connection with § 2(a)(21). The legislative history suggests that it, too, was designed to apply only where bankruptcy superseded the prior proceedings. H. Rep. No. 1409, *supra*, p. 12. As stated by the draftsman, "It makes clear and certain the exclusive and paramount jurisdiction of the bankruptcy court over property dealt with in a prior equity receivership or like proceeding which is superseded by a bankruptcy proceeding." Weinstein, *op. cit.*, p. 154. And see 4 Collier, *op. cit.*, pp. 879-882.

Affirmed.

Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.

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[7] Similar considerations are applicable to real property arrangements under Ch. XII. Secs. 406(1), 411, 416, 428.